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UNITED STATES-CANADA FREE TRADE AGREEMENT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

THE CONSTITUTIONALITY OF ESTABLISHING A BINATIONAL PANEL TO RESOLVE DISPUTES IN ANTIDUMPING AND COUNTERVAILING DUTY CASES

MAY 20, 1988

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UNITED STATES-CANADA FREE TRADE AGREEMENT

FRIDAY, MAY 20, 1988

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 1:35 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (acting chairman) presiding.

Also present: Senator Grassley.

Staff present: Mamie Miller and Karen Kremer (Senator Heflin); Jeff Peck (Senator Biden); Tara McMahon (Senator DeConcini); Melissa Patack (Senator Grassley); Margaret Morton (Senator Specter); Abby Kuzma (Senator Hatch); Kevin McMahon (Senator Thurmond).

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. We will now turn to consideration of the United States-Canada Free Trade Agreement. The primary area of concern to the Judiciary Committee is the establishment of a binational panel to resolve disputes in anti-dumping and countervailing duty cases.

The purpose of this hearing is to discuss the constitutionality of this provision and to explore the mechanics of how such a provision should be implemented.

We look forward to the testimony of our distinguished witnesses, and we will keep the record open until the close of business May 23rd for those individuals who would like to submit a statement for the record and for today's witnesses to respond to any questions submitted for the record.

The first panel includes Ambassador Alan Holmer, Deputy U.S. Trade Representative; M. Jean Anderson, Chief Counsel, International Trade, Department of Commerce, and John McGinnis, of the Office of Legal Counsel of the Department of Justice.

If you would come forward, Ambassador Holmer, we will hear from you first.

STATEMENT OF A PANEL INCLUDING: AMBASSADOR ALAN F. HOLMER, DEPUTY U.S. TRADE REPRESENTATIVE, ACCOMPANIED BY JUDITH H. BELLO, GENERAL COUNSEL; M. JEAN ANDERSON, CHIEF COUNSEL FOR INTERNATIONAL TRADE, U.S. DEPARTMENT OF COMMERCE, AND JOHN O. McGINNIS, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Ambassador HOLMER. Thank you very much, Mr. Chairman.

We appreciate the opportunity to testify about this agreement.

I am accompanied this afternoon by Mrs. Judith Bello, who is our General Counsel at USTR. I will make some brief comments overall with respect to the agreement itself; we will then have Ms. Anderson from the Commerce Department, who will present some views with respect to the binational panel issues, and then Mr. McGinnis from the Justice Department will present some views with respect to the constitutionality issues that are raised with respect to the binational panel issues.

We believe, Mr. Chairman, that this is an agreement that is truly stunning in its scope. You are talking about $160 billion in bilateral trade between the United States and Canada where two of the world's largest traders are combining together to create the world's largest shared market.

We believe this is truly a win-win agreement for the United States and Canada that is going to be of tremendous benefit to the United States.

Let me just run through if I could, briefly, why we feel that is the case. There are tariff provisions in this agreement that are going to cause tariffs on both sides of the border to go from their present level—where on the Canadian side, tariffs are about 9 or 10 percent; on the United States side, tariffs run about 3 or 4 percent—those tariffs are all going to go to zero, across-the-board, no exceptions. And there are estimates that that will increase U.S. exports by $2.6 billion per year.

With respect to the investment chapter of the agreement, we are one heck of a lot better off under this agreement than before, and the Canadians will not be able to go back to the more restrictive investment policies of the 1970s.

The energy chapter is a big, big plus for the agreement, particularly for energy-consuming States, but this helps all energy consumers, not just individuals but businesses, both in the agriculture and the manufacturing sectors.

There is a services chapter. Services trade is relatively open on both sides of the border now; this agreement locks that in. There are a series of provisions in the agricultural area that are going to expand U.S. agricultural exports. There is a government procurement chapter that expands the coverage of the government procurement code and should make U.S. companies eligible for an additional $500 million in Canadian Government procurement. There are favorable improvements in the automobile area, and there are dozens of other improvements that I could cite to you.

Where we are in the process, Mr. Chairman, is that we have had extensive discussions with the Ways and Means Committee and the Finance Committee. During the course of those discussions, just

over the course of the last week, we have been able to successfully resolve issues in a manner that is acceptable to those committees and acceptable to the administration in the area of eggs, autos, oil import fees, plywood, rules of origin, steel, wheat, fish subsidies, ethyl alcohol, zinc alloy, fresh fruits and vegetables. And the result of all that is that it has been an enormously cooperative process between the executive branch and the legislative branch. We are very grateful for that. We look forward to that process continuing with this committee, Mr. Chairman.

That would conclude my oral presentation.

Thank you very much.

[The statement follows:]

TESTIMONY OF

AMBASSADOR ALAN F. HOLMER

DEPUTY UNITED STATES TRADE REPRESENTATIVE

BEFORE THE

COMMITTEE ON THE JUDICIARY

MAY 20, 1988

Thank you for the opportunity to testify before you today on the U.S.-Canada Free Trade Agreement. I would like to focus my remarks on the Agreement as a whole, while Jean Anderson from the Department of Commerce will discuss in more detail on the dispute settlement provisions relating to antidumping and countervailing duties which are of particular interest to this Committee.

The formal signing of the Free Trade Agreement on January 2 by President Reagan and Prime Minister Mulroney culminated almost two years of complex, and sometimes difficult negotiations. It is all too easy, especially in politics, to use hyperbole. But it is no exaggeration to say that this is a truly historic document.

Trade between the United States and Canada too often is taken for granted. Our trade problems with Japan and the European Community are so much in the spotlight that most Americans still don't realize Canada is our biggest trading partner. Yet over $130

billion in goods cross our common border annually. With $60 billion in U.S. exports to Canada in 1987, Canada is also our largest and fastest growing export market.

These negotiations were characterized by hard bargaining and difficult compromises. Many will seek to identify winners and losers, but that approach is too narrow. This is a win-win Agreement. It should result in increased economic activity, higher trade levels, more jobs, and enhanced competitiveness for both the United States and Canada. The people of both countries will benefit from this Agreement, through lower prices and greater consumer choice.

The U.S.-Canada Free Trade Agreement is the most comprehensive bilateral trade agreement ever negotiated. As the world's largest trading partners we are constructing the world's largest shared market. We have submitted to the Committee today an extensive summary of the Agreement. Therefore, in my formal statement I will only highlight its main provisions.

Under the Agreement, we have provided for the elimination of all tariffs between the United States and Canada. Since Canadian tariffs are, on average, more than twice as high as comparable U.S. rates, total tariff elimination will provide significant benefits for the U.S. exporter.

For the first time since services became a major international commercial issue, two major trading partners have negotiated an agreement establishing rules for bilateral trade in services. These rules will cover scores of service sectors, such as construction, telecommunications network-based enhanced services and computer services, architecture, accounting, tourism, insurance, and engineering. Not only is this important for U.S.-Canada services trade, but it provides a concrete first step for our efforts to formulate multilateral rules for services at the GATT Uruguay Round. We also concluded the first bilateral agreement with any other country covering the financial services sector.

We are establishing much freer and more secure trade in energy. The Agreement calls for nondiscriminatory access for the United States to Canadian energy supplies and secure market access for Canadian energy exports to the United States. Our approach is market-oriented. Under the FTA the Canadian Government will not be able to impose higher prices on us than they charge Canadians. Cheaper and more secure energy supplies will make U.S. industries more competitive, both in North America and throughout the world.

Also for the first time, the United States and Canada have agreed to rules governing bilateral investment activities. The Agreement reduces the screening of U.S. investment in Canada, and moves Canada towards a more open, market-oriented investment environment.

In light of its responsibilities, we recognize that this Committee will have a particular interest in the provisions of the FTA relating to review by binational panels of decisions under the countervailing duty and antidumping laws of the United States and Canada. These provisions were among the most difficult to settle in the negotiations. We finally agreed to retain existing national laws and procedures dealing with subsidies and dumping. But final administrative decisions taken under those laws may be reviewed by binational dispute settlement panels upon the request of either party. Such final administrative decisions will not be subject to judicial appeal in either country. Under the terms of the FTA, determinations by binational panels will create binding international obligations on the United States and Canada.

I will leave discussion of the details of these provisions to Jean Anderson. The only point I would add here is that the FTA provides for the United States and Canada to negotiate a new regime over the next five to seven years that would address more effectively the subsidy and dumping issues covered by this binational dispute settlement mechanism. For the interim period, the binational panel provisions may help defuse frictions arising out of suspicion in each country that the other's unfair trade laws are not being applied fairly. But over the longer term, we believe both countries will be seeking a regime involving stronger rules and direct disciplines in the FTA over unfair trade practices rather than maintaining or expanding a system in which our

national legal standards are incorporated by reference and applied by binational dispute settlement panels.

In addition to the areas I have already mentioned, the Agreement also covers, in considerable detail, automotive trade, agriculture, alcoholic beverages, customs matters, government procurement, product standards, personnel movement, and many other areas. These are all described in detail in the summary we submitted to the Committee today.

The proposed Agreement spans many sectors of our economies. Numerous U.S.industries and groups have already voiced strong support. Nonetheless, we recognize that, despite widespread enthusiasm for this Agreement, some may disagree. For some, there may be too much free trade in this Free Trade Agreement. Some special interests will see themselves as vulnerable to increased competition in a free trade area. But we should not lose sight of the overall interests of this country and the very positive effects of this Agreement. We should not be timid, afraid to try a creative approach to the future. This country was built on a willingness to accept challenges and to compete. In this dynamic, interdependent world, these qualities that built our country have never been more important. We have never settled for the status quo; this Agreement will help us move forward.

Then there are those who are disappointed because they wanted more and wanted it now. Unfortunately, some entered these negotiations with unrealistic expectations that the negotiations would cure all their ills. This Agreement is not a panacea for every ill. It will reduce, but not end, trade frictions. It will minimize, but not eliminate, trade distortions. There never has been, and likely never will be, perfectly free trade between any two independent sovereign countries. This Agreement was never intended to solve all our bilateral trade problems and should not be expected to do so. By establishing dispute resolution and consultation mechanisms, the agreement explicitly recognizes this fact. It is a vast improvement over the prevailing situation, and a bold step toward significantly freer trade between our countries. It is an important advancement over the status quo.

Failure to implement this Agreement would have serious repercussions for both countries. The United States and Canada would clearly miss out on a once-in-a-century opportunity. We would be deprived of the enormous economic gains which will come from this Agreement as well as the intangible benefits of developing an even closer relationship with our friendly neighbors to the north.

We would also lose the impetus it gives to the new GATT round. If the United States and Canada -- the two largest trading partners in the world, next door neighbors, the closest of friends and allies -- cannot liberalize their trading relationship,

what hope do we have of success in Geneva?

The question on both sides of the border should be: "Will this Agreement make my country a better and more prosperous place to live a decade or a half century from now?" The objective answer to that question will be a resounding yes!

We must keep our eyes squarely on the long-range benefits for each nation as a whole. This Agreement will help both Americans and Canadians enter the 21st century more competitive and better prepared for the future.

We should approve this Agreement and then build on it in the future. It will, without doubt, be the most significant bilateral trade agreement either country has ever negotiated.

National Governors' Association

John M. Sununu
Governor of New Hampshire
Chairman

Raymond C. Scheppach
Executive Director

H-7. U.S. - CANADIAN TRADE

The Governors support implementation of the Free Trade Agreement negotiated by the federal governments of the United States and Canada. Our support is contingent upon Canada and the U.S. doing nothing in the interim to violate the spirit of the explicit understanding affirmed in writing on January 2, 1988 to "exercise their discretion in the period prior to entry into force of the accord so as not to jeopardize the approval process or undermine the spirit and benefits of the Free Trade Agreement."

The agreement, while not fully addressing all issues relating to our bilateral trade, is expected to contribute to real growth in the economies of both signatories. It represents a positive step toward the open, competitive world trading system that we have endorsed. It provides for more timely and effective resolution of disputes between the two largest trading partners in the world.

Throughout the negotiations, the Office of the U.S. Trade Representative has sought our advice and made it a priority to keep us informed on progress. As the related legislation is developed and debated, we will continue to consult with the administration and Congress regarding its impact on state economies.

Emphasizing the importance of U.S. - Canadian relations, we will continue our meetings with the Canadian Premiers on issues of mutual interest, including options for greater trade cooperation between our two countries.

We believe that efforts should continue to be made to resolve those issues not fully addressed during the negotiations and that remaining inconsistencies with the General Agreement on Tariffs and Trade (GATT) rules should be vigorously pursued. We will work with Congress and the administration and within our states to minimize any adverse effects of the agreement.

The Governors have significant concerns about issues created or not fully resolved by the agreement and ask to be consulted as the implementing legislation or other measures are developed to ameliorate these problems.

The administration should enter into additional negotiations to address inequities regarding subsidies. Fair and open trade for all businesses requires resolution of the reality or perception of unequal treatment of certain industries due to differing national policies on subsidies.

Adopted February 1988.

ACTE/CAN MEMBERS
as of April 29, 1988

ABC Custom Cedar Homes, Inc.	Sonoma, CA
ADC Telecommunications	Bloomington, MN
AT&T	New York, NY
A-C Brake Co., Inc.	Louisville, KY
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ADAPSO	Arlington, VA
ALCOA	Pittsburgh, PA
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Action Associates	Bloomington, MN
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Afro/Hispanic-American Chambers of Commerce	Bossier City, LA
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Allis - Chalmers Corporation	West Allis, WI
Almerica Overseas, Inc.	Destin, FL
Alpha Research, Inc.	Glendale, WI
Alumax, Inc.	San Mateo, CA
Amana Refrigeration, Inc.	Amana, IA
Amatos, Inc.	Middletown, CT
Ambler Organizational Consultants, Inc.	Cherry Hill, NJ
Amerace Corporation	Hackettstown, NJ
Amerex Corporation	Trussville, AL
American Association of Exporters & Importers	New York, NY
American Association of Meat Processors	Elizabethtown, PA
American Business Conference	Washington, DC
American Cast Metals Association	Des Plaines, IL
American Council of Independent Laboratories	Washington, DC
American Electronics Association	Washington, DC
American Express Company	New York, NY
American Federation of Small Business	Chicago, IL
American Frozen Food Institute	McLean, VA
American Furniture Manufacturers Association	Washington, DC
American Gas Association	Arlington, VA
American Hotel and Motel Association	Washington, DC
American Institute of Marine Underwriters	New York, NY
American Institute of Small Business	Minneapolis, MN
American Meat Institute	Rosslyn, VA
American Newspaper Publishers Association	Washington, DC
American Paper Institute	New York, NY
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American Street Corridor Business Association	Philadelphia, PA
American Trucking Association	Alexandria, VA

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Barrister Information Systems Corporation	Buffalo, NY
Bearings, Inc.	Cleveland, OH
Beckman Instruments, Inc.	Fullerton, CA
Bemis Manufacturing Company	Sheboygan Falls, WI
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Brodart Company	Williamsport, PA
Brooklyn Union Gas Company	Brooklyn, NY
Brown Capital Management, Inc.	Baltimore, MD
Brown Deer Bank	Brown Deer, WI
Brown-Forman Corporation	Louisville, KY
Buffalo Forge Company	Buffalo, NY
Buffalo News	Buffalo, NY
Business Roundtable	Washington,DC
CAN-AM Business Council of the Greater Buffalo Chamber of Commerce	Buffalo, NY
CF Industries	Long Grove, IL
CPC International, Inc.	Englewood Cliffs, NJ

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Chattahoochee Business Group	Marietta, GA
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Control Data Corporation	Minneapolis, MN
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Creative Management Concepts	Reading, PA
Curtis Circulation Company	Hackensack, NJ
Custom Engineering, Inc.	Englewood, CO
D&M Consulting & Brokerage, Inc.	Marshfield, WI
D-M-E Company	Madison Heights, MI
Dawg Duvers & Company	Jesup, GA
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Design & Manufacturing Corporation	Connersville, IN
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Distilled Spirits Council of the U.S., Inc	Washington, DC
Dollar Power Discount Store	San Francisco, CA
Dolphin Photo Center, Inc.	Bend, OR
Donaldson Company, Inc.	Minneapolis, MN
Dow Chemical, U.S.A.	Midland, MI
Dow Corning Corporation	Midland, MI
Dunkin' Donuts Incorporated	Randolph, MA
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Kingsbury Machine Tool Corporation	Keene, NH
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Koester Corporation	Defiance, OH
Kraft, Inc.	Glenview, IL
Krughoff Company	Naperville, IL
L.R. Nelson Corporation	Peoria, IL
LC Technologies, Inc.	Fairfax, VA
Lafarge Corporation	Washington, DC
Lamanite Enterprises Corporation	Clearfield, UT
Lancaster Laboratories, Inc.	Lancaster, PA
Laramy Products Company	Lyndonville, VT
Lavelle Aircraft Company	Philadelphia, PA
Lear Jet Corporation	Wichita, KS
Lee, Theisen & Stegall	Phoenix, AZ
Lennox Industries, Inc.	Dallas, TX
Lewis Ranches	Portland, OR
Lin-Art, Ltd.	Arlington Heights, IL
Litton Industries	Woodland Hills, CA
Longyear Company	Minneapolis, MN
Louisiana Association of Business and Industry	Baton Rouge, LA
Louisiana Retailers Association	Baton Rouge, LA
Louisville Plate Glass Company	Louisville, KY
Lowe's Companies, Inc.	North Wilkesboro, NC
Lumbermen Associates, Inc.	Philadelphia, PA
M. Brown & Sons, Inc.	Bremen, IN
M. S. Hansson, Inc.	Boulder, CO
MDB, Inc.	Pittsburgh, PA
Mack Trucks Inc.	Allentown, PA
Macmillan, Inc.	New York, NY
Maidenform, Inc.	New York, NY
Maine Machine Products Company	South Paris, ME
Maine Wild Blueberry Company	Machias, ME
Manufactured Buildings Components, Corp.	East Lansing, MI
Manufacturers Hanover Trust Co.	New York, NY
Marco Wood Products	Walled Lake, MI
Margaret Coleman Associates	Hinsdale, IL
Marketing Communications Systems	Portland, OR
Markets Abroad, Inc.	Miami, FL

Marriott Corporation	Washington, DC
Marsh & McLennan, Inc.	New York, NY
Marshall & Associates	Topsfield, MA
Mary Kay Cosmetics	Dallas, TX
Mattel, Inc.	Hawthorne, CA
Mayflower Transit, Inc.	Indianapolis, IN
Maytag Corporation	Newton, IA
McIntosh, Inc.	Norfolk, NE
McLaurin Parking Company	Raleigh, NC
McMinnville City Sanitary Service, Inc.	McMinnville, OR
Measurex Corporation	Cupertino, CA
Mel Boldt & Association	Mt. Prospect, IL
Mentholatum Company	Buffalo, NY
Merck & Co., Inc.	Rahway, NJ
Metal Treating Institute	Jacksonville Beach, FL
Metropolitan Life Insurance Company	New York, NY
Mid-Continent Cold Storage Company	Omaha, NE
Milbar Corporation	Chagrin Falls, OH
Miller Picking Corporation	Johnsontown, PA
Minnesota Mining & Manufacturing Company (3M)	St. Paul, MN
Mobil Oil Corporation	New York, NY
MonArk Boat Company	Monticello, AR
Monsanto Company	St. Louis, MO
Morgan Guarantee	New York, NY
Morton Buildings, Inc.	Morton, IL
Mosbacher Energy Company	Houston, TX
Moser Bag & Paper Company	Cleveland, OH
Mosler International	Hamilton, OH
Motor Vehicle Manufacturers Association	Detroit, MI
Murphy Oil Corporation	El Dorado, AR
N. J. Chapter - National Association of Women Business Owners	Cherry Hill, NJ
NVRyan	McLean, VA
Nalco Chemical Company	Naperville, IL
National American Wholesale Grocers Association	Falls Church, VA
National Association of Beverage Importers, Inc.	Washington, DC
National Association of Home Builders	Washington, DC
National Association of Manufacturers	Washington, DC
National Association of Photographic Manufacturers	Harrison, NY
National Association of Printing Ink Manufacturers	Harrison, NY
National Association of Women Business Owners	Chicago, IL
National Federation of Independent Business	Washington, DC
National Foreign Trade Council	New York, NY
National Frame Builders Association	Kansas, City, MO
National Grange	Washington, DC
National Gypsum Company	Dallas, TX
National Hispanic Business Association	Chamblee, GA
National Lumber & Building Materials Dealers Association	Washington, DC
National Machine Tool Builders Association	McLean, VA

National Retail Merchants Association	Washington, DC
National Small Business United	Washington, DC
National Starch & Chemical Corporation	Bridgewater, NJ
National-American Wholesalers Grocers' Association	Washington, DC
Nestle Enterprises, Inc.	Solon, OH
New England Council, Inc.	Boston, MA
New England Electric System	Westborough, MA
New Jersey Small Business Unity Council	Little Silver, NJ
Newlyweds Foods, Inc.	Chicago, IL
Nicholson, Inc.	Helena, MT
Norstar Bank	Buffalo, NY
North Haven Gardens	Dallas, TX
Northeastern Retail Lumbermen's Association	Rochester, NY
Northland Corporation	Greenville, MI
Northwest River Supplies, Inc.	Moscow, ID
O'Brien Communications	Del Mar, CA
Oakes & McClelland Company	Greenville, PA
Oakwood Markets, Inc.	Kingsport, TN
Occidental Chemical Corporation	Dallas, TX
Ogilvy & Mather International	New York NY
Oneida Ltd.	Oneida, NY
PC Etcetera	New York, NY
PII Affiliates, Ltd.	Manchester, PA
PLM Companies, Inc.	San Francisco, CA
PMI/Taylor Advertising	Columbus, OH
PPG Industries, Inc.	Pittsburgh, PA
Pacer Systems, Inc.	Billerica, MA
Pacific Interstate Company	Los Angeles, CA
Pacific Northwest International Trade Association	Portland, OR
Panhandle Eastern Corporation	Houston, TX
Paragon Electric Company, Inc.	Two Rivers, WI
Parlette Tire Co., Inc.	Erie, PA
Peat Marwick Main & Company	New York, NY
Pennwalt Corporation	Philadelphia, PA
People to People Associates	Lexington, MA
Pepsi-Cola International	Somers, NY
Perham Egg, Inc.	Perham, MN
Perlis Truckstops	Cordele, GA
Pet Incorporated	St. Louis, MO
Pfizer, Inc.	New York, NY
Pharmaceutical Manufacturers Association	Washington, DC
Philips Industries, Inc.	Dayton, OH
Picken Parts, Inc.	Fresno, CA
Pillsbury Company	Minneapolis, MN
Plabell Rubber Products, Inc.	Toledo, OH
Plasma Energy Corporation	Raleigh, NC
Plasco, Inc.	Woburn, MA
Ply*Gem Industries, Inc.	New York, NY
Polaris Industries, Inc.	Minneapolis, MN
Polaroid Corporation	Cambridge, MA
Powermax, Inc.	Columbus, OH
Pratt & Lambert	Buffalo, NY

Pre-Paid Legal Services	Ada, OK
Precision Twist Drill Company	Crystal Lake, IL
Price Company	San Diego, CA
Principal Financial Group	Des Moines, IA
Prinova Co., Inc.	San Francisco, CA
Printing Industries of America	Arlington, VA
Procter & Gamble	Cincinnati, OH
Product Development Corporation	Little Rock, AR
Professional Service Corporation	Green Bay, WI
Professional Wealth Management, Inc.	Asheville, NC
Professional Women in Construction & Allied Industries	White Plains, NY
Progressive Management Enterprises, Ltd.	St. Louis, MO
Pulp & Paper Machinery Manufacturers' Association	Washington, DC
Queen Carpet Corporation	Dalton, GA
Queen City Industries, Inc.	Piqua, OH
Quick, Finan & Associates, Inc.	Washington, DC
Quill Corporation	Lincolnshire, IL
Quillen Group	Groton, CT
R. R. Accessories, Inc.	Boston, MA
R. R. Donnelley & Sons Company	Chicago, IL
RJR Nabisco	Atlanta, GA
Radio KDNO	Delano, CA
Ramada, Inc.	Phoenix, AZ
Raytheon Company	Lexington, MA
Recognition Equipment, Inc.	Dallas, TX
Recon/Optical, Inc.	Barrington, IL
Rexnord, Inc.	Brookfield, WI
Rheem Manufacturing Company	New York, NY
Ridenour & Associates	Chicago, IL
Riordan, Crivello, Carlson & Menthkowski	Milwaukee, WI
Roll-o-Matic, Inc.	Kansas City, MO
Rooney, Plotkin & Willey	Providence, RI
Rorer International Pharmaceuticals	Fort Washington, PA
Rotron Engineering Company, Inc.	Woburn, MA
Rubber Manufacturers Association	Washington, DC
Rudolph Beaver, Inc.	Waltham, MA
Rural Gravuce Services, Inc.	Madison, WI
Russ Berrie and Company, Inc.	Oakland, NJ
S. C. Johnson & Son, Inc.	Racine, WI
SNC Manufacturing Company	Oshkosh, WI
Sabre Yachts	South Casco, ME
Safeway Stores, Inc.	Oakland, CA
Samsonite Corporation	Denver, CO
Sandmeyer Steel Company	Philadelphia, PA
Sargent-Welch Scientific Company	Skokie, IL
Scientific-Atlanta, Inc.	Atlanta, GA
Scott Paper Company	Philadelphia, PA
Sears, Roebuck and Company	Chicago, IL
Shaw Mudge & Company	Stamford, CT
Shell Oil Company	Houston, TX
Sheridan & Fritz, P.C.	Harrisburg, PA
Siliconix, Inc.	Santa Clara, CA

Simplex Time Recorder Company	Gardner, MA
Singer Company	Stamford, CT
Singer, Lewak, Greenbaum & Goldstein	Los Angeles, CA
Smada, Inc.	Phoenix, AZ
Small Business Foundation of America	Boston, MA
Small Business Hawaii, Inc.	Honolulu, HI
Small Business United of Missouri	St. Louis, MO
Smaller Business Associates of New England	Boston, MA
Smaller Manufacturers Council	Pittsburgh, PA
Smith Barney, Harris, Upham & Co., Inc.	New York, NY
Smith Rollinson	Alexandria, VA
Snyder General Corporation	Dallas, TX
Southern Connecticut Gas Company	Bridgeport, CT
Spacesaver Corporation	Fort Atkinson, WI
Specialized Carriers & Rigging Association	Alexandria, VA
Square One, Inc.	Madison, WI
Squibb Corporation	Princeton, NJ
Sta-Rite Overseas Corporation	Milwaukee, WI
Stackpole Corporation	Boston, MA
Standard-Thomson Corporation	Waltham, MA
Stemco, Inc. Truck Products	Longview, TX
Steiner Shipyard, Inc.	Bayou La Batre, AL
Stiegler, Inc.	Fargo, ND
Stone & Webster Engineering Corporation	Boston, MA
Storage Technology Corporation	Louisville, CO
Stripling-Blake Building Lumber Co., Inc	Austin, TX
Sun Electric Corporation	Crystal Lake, IL
Superior Technical Ceramics Corporation	St. Albans, VT
Syntex Corporation	Palo Alto, CA
T&H Building Supply	Redwood City, CA
TAPJAC Home Centers	Carthage, MO
TRW, Inc.	Cleveland, OH
TVI Creative Specialists	Washington, DC
Tandem Computers Incorporated	Cupertino, CA
Tandy Brands, Inc.	Fort Worth, TX
Tandy Corporation	Fort Worth, TX
Tanner Systems, Inc.	Sauk Rapids, MN
Tatum Enterprises	Honolulu, HI
Technivest, Inc.	South Bend, IN
Ted Grob Sales, Inc.	Grafton, WI
Telemarketing Company	Chicago, IL
Tenneco Gas Pipeline Group	Houston, TX
Termiflex Corporation	Merrimack, NH
Terry Neese Personnel Services	Oklahoma City, OK
Texas Industries, Inc.	Dallas, TX
Textron, Inc.	Providence, RI
Thomas J. Seitz Co., Inc.	Racine, WI
Tingley Systems, Inc.	San Antonio, FL
Toledo Harbor Warehousing, Inc.	Toledo, OH
Touche-Ross	New York, NY
Tracor, Inc.	Austin, TX
Trail King Industries, Inc.	Mitchell, SD
TransTech, Inc.	East McKeesport, PA
Tri-M Corporation	Kennett Square, PA

Triangle Research Development Corp.	Research Triangle Park, NC
Trinity Industries, Inc.	Dallas, TX
Trouble Shooters, Inc.	Omaha, NE
Truck Trailer Manufacturers Association	Alexandria, VA
Trucking Services, Inc.	Dearborn Heights, MI
U.S. Axle, Inc.	Pottstown, PA
U.S. Bearings & Drives of CA, Inc.	Santa Clara, CA
U.S. Chamber of Commerce	Washington, DC
U.S. Council for International Business	Washington, DC
USG Corporation	Chicago, IL
Ultrasystems, Inc.	Irvine, CA
Unilever United States, Inc.	New York, NY
United Fresh Fruit & Vegetable Association	Alexandria, VA
United Illuminating Company	New Haven, CT
United Industries, Inc.	Wichita, KS
Upjohn Company	Kalamazoo, MI
Valspar Corporation	Minneapolis, MN
Vanport Manufacturing, Inc.	Boring, OR
Village Green	Midland, MI
Virco Manufacturing Corporation	Torrance, CA
Vocational Rehabilitation Associates, Inc.	Eugene, OR
W.H. Brady Company	Milwaukee, WI
W.R. Grace & Company	New York, NY
WIS, Inc.	Toledo, OH
Wainoco Oil Corporation	Houston, TX
Waldorf Corporation	St. Paul, MN
Wayer Corporation	Landover, MD
Western Publishing Company, Inc.	Racine, WI
Weyerhaeuser Company	Tacoma, WA
Whale Scientific, Inc.	Commerce City, CO
Whirlpool Corporation	Benton Harbor, MI
White Plains Iron, Inc.	New York, NY
Wholesale Florists & Florist Suppliers of America	Arlington, VA
Will-Burt Company	Orrville, OH
William A. Price & Associates	Wheaton, IL
William H. Taylor & Company, Inc.	Allentown, PA
Wingspread Corporation	New York, NY
Women Entrepreneurs	Lincolnwood, IL
Women Featherbone Company	Gainesville, GA
Woodhead Industries, Inc.	Northbrook, IL
World Trade Counselors	Estes Park, CO
Zimpro Passavant, Inc.	Rothschild, WI
ZinYeast, Inc.	Marshfield, WI

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON
20506

SUMMARY OF

THE U.S.-CANADA FREE TRADE AGREEMENT

February 1988

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THE WHITE HOUSE

Office of the Press Secretary
(Palm Springs, California)

January 2, 1988

STATEMENT BY THE PRESIDENT

I am pleased to announce that Prime Minister Mulroney and I have today entered into an agreement to establish a free trade arrangement between the United States and Canada.

In the truest sense, this is an historic agreement for both sides. We will strengthen what is already a deep friendship between our people by enhancing economic opportunities and creating jobs in both countries. Moreover, the agreement firmly establishes that the trade environment between the two countries will in the future be founded on the principle of free and open trade.

This comprehensive agreement will benefit many sectors of the U.S. economy. Canadian and American tariffs will be phased out completely, saving consumers hundreds of millions of dollars while also improving our export opportunities. It will secure access to Canada's market for American manufacturing, agriculture, financial services, and high technology; improve national security through energy sharing; and provide important investment opportunities. Canada will benefit from the agreement in many of these same ways; the pact is truly reciprocal. As the agreement goes into effect, Canada's access to our large domestic market will grow, and Canadian industrial centers will gain opportunities to develop even more important roles in the economy of North America.

The agreement to establish a free trade area has important international implications as well. It will encourage supporters of free trade throughout the world by demonstrating that governments can remove trade barriers even in the face of protectionist pressures. We hope that the U.S.-Canada example will help set the tone for the Uruguay Round multilateral trade negotiations.

Our negotiations with the Canadian government leading to this agreement incorporated advice from Congress, industry, agriculture, and labor. Our Congress, as well as the Canadian Parliament, will review the agreement fully over the next several months. As this process begins, both sides should be mindful that the decisions they make will help shape the relationship between our

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countries in the years to come, and will send a signal to the rest of the world.

The creation of the world's largest free trade area will be a mark of leadership and presents an historic opportunity to the United States and Canada. We must not let this opportunity slip from our grasp.

# # #

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release — January 2, 1988

FACT SHEET

U.S.-CANADA FREE TRADE AGREEMENT

The United States and Canada have entered into a free trade agreement that, if approved and implemented, will take effect on January 1, 1989. The agreement will:

- Eliminate all tariffs on bilateral goods trade within 10 years of implementation;
- Reduce nontariff trade barriers;
- Establish principles for the conduct of bilateral trade in services;
- Establish rules for the conduct of bilateral investment;
- Resolve many outstanding bilateral trade issues;
- Enhance the energy and national security of the two countries;
- Facilitate business travel; and
- Establish a timely bilateral dispute settlement mechanism.

Economic Implications

Each year the U.S. and Canada exchange more goods and services than any two countries in the world. Bilateral trade in goods and services exceeded $150 billion in 1986.

The elimination of tariffs and most other barriers to trade between the two countries will increase economic growth, lower prices, expand employment and enhance the competitiveness of both countries in the world marketplace.

Chronology of the Negotiation

- In March 1985, President Reagan and Prime Minister Mulroney asked their trade officials to explore ways to reduce and

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eliminate existing barriers to trade between the U.S. and Canada.

- On September 26, 1985, Prime Minister Mulroney formally requested that the U.S. and Canada examine the potential for negotiating a comprehensive free trade agreement.

- On December 10, 1985, President Reagan notified the Congress of his intent to enter into bilateral negotiations with Canada using "fast track" procedures.

- On June 17, 1986, U.S. and Canadian negotiators on the free trade area met for the first time in Ottawa.

- On October 3, 1987, President Reagan notified Congress of his intent to enter into a free trade agreement with Canada.

- On December 9, 1987, U.S. and Canadian negotiators initialled a final text of the agreement.

- On January 2, 1988, President Reagan and Prime Minister Mulroney signed the final text of the agreement.

The Fast Track

Section 102 of the Trade Act of 1974 authorizes the President to enter into bilateral free trade agreements and to have the Congress approve them on a "fast track" basis. Section 102 authority expires at midnight on January 2, 1988.

In order for a bilateral agreement to qualify for fast track consideration, several conditions must be met:

- The negotiation must be requested by the foreign country;

- The President must notify the House Ways and Means and Senate Finance Committees of the negotiations, giving them 60 legislative days advance notice;

- The President must notify the Congress of his intent to enter into an agreement 90 days before doing so.

After entering into an agreement, the President must submit it to Congress, along with a draft implementing bill, a statement of any administrative action proposed to implement the agreement, an explanation of how the bill or statement changes or affects existing law and a statement of reasons why the agreement serves the interests of U.S. commerce and why the bill and proposed action are required and appropriate.

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The implementing bill is introduced in both Houses of Congress on the day it is submitted and is referred to the committees of jurisdiction. House committees have 45 days in which the House is in session to report the bill; they are discharged automatically from further consideration after that period. The House votes within 15 days in session after the measure has been received from the House committees.

After receiving the bill from the House, the Senate committees have 15 days in which the Senate is in session to report the bill; they are discharged automatically from further consideration after that period. The Senate votes within 15 days in session after the measure has been received from the Senate committees.

Amendments to the bill are not in order. A simple majority of each House is required for approval.

# # #

BRIEF SUMMARY OF KEY FTA PROVISIONS

- **Tariffs**: Eliminates all tariffs on U.S. and Canadian goods by 1998.

- **Rule of origin**: Uses a rule of origin to prevent third country goods from receiving FTA tariff treatment.

- **Customs**: Ends customs user fees for goods and duty drawback programs by 1994 for bilateral trade and duty waivers linked to performance requirements by 1998 (except for the Auto Pact).

- **Quotas**: Eliminates import and export quotas unless allowed by the GATT or grandfathered by the FTA.

- **National treatment**: Reaffirms GATT principle preventing discrimination against imported goods.

- **Standards**: Prohibits use of product standards as a trade barrier and provides for national treatment of testing labs and certification bodies.

- **Agriculture**: Eliminates all bilateral tariffs and export subsidies and limits or eliminates quantitative restrictions on some products, including meat. Eliminates Canadian import licenses for wheat, oats and barley when U.S. crop price supports are equal or less than those in Canada.

- **Wine and Distilled Spirits**: Removes most discriminatory practices against wine or spirits imported from the other country.

- **Energy**: Prohibits most import and export restrictions on energy goods, including minimum export prices. Requires any export quotas used to enforce short supply or conservation measures to share resources proportionately. Provides for Alaskan oil exports of up to 50,000 barrels per day to Canada.

- **Autos**: Replaces and Canadian content rule for duty-free Auto Pact imports into the U.S. with tougher FTA content rule. (Most auto trade already is duty-free under the U.S.-Canada Auto Pact.) Does not change rules for Auto Pact-qualified companies importing duty-free into Canada, but does not allow new companies to qualify. Permits U.S. auto and parts exports that meet the FTA rule to enter Canada at FTA tariff rates, which phase out over 10 years. Ends all Canadian duty remission programs for autos by 1998.

- **Emergency action**: Allows temporary import restrictions to protect domestic industries harmed by imports from the other country in limited circumstances.

- Government procurement: Expands the size of government procurement markets that will be open to suppliers from the other country.

- Services: Commits governments not to discriminate against covered service providers of the other country when making future laws or regulations. (Exempts transportation services.)

- Temporary Visas: Facilitates travel for business visitors, investors, traders, professionals and executives transferred intra-company.

- Investment: Provides national treatment for establishment, acquisition, sale and conduct and operation of businesses. (Exempts transportation.) Commits Canada to end review of indirect acquisitions and to raise to C$150 million (in constant 1992 Canadian dollars) the threshold for review of direct acquisitions. Bans imposition of most investment performance requirements.

- Financial Services: Exempts U.S. bank subsidiaries in Canada from Canada's 16 percent ceiling on assets of foreign banks. Ends Canada's foreign ownership restriction on U.S. purchases of shares in federally regulated insurance and trust companies. Reviews U.S. firms' applications for entry into Canadian financial markets on the same basis as Canadian firms' applications. Permits banks in the U.S. to underwrite and deal in debt securities fully backed by the Government of Canada or political subdivisions. Guarantees continuation of multi-state branches of Canadian banks.

- General dispute settlement (except for financial services and countervailing duty and antidumping duty cases): Establishes a binational commission to resolve disagreements.

- CVD/AD dispute settlement (for countervailing and antidumping duties): Allows countries to continue to apply existing national laws. Replaces court review with a binational panel (when requested), which must apply national law in rendering decisions under international law.

- Softwood lumber: Preserves the 1986 agreement with Canada on provincial pricing practices.

- Culture: Exempts cultural industries from the FTA, but authorizes measures of equivalent commercial effect in response to actions otherwise inconsistent with the FTA.

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SUMMARY OF THE AGREEMENT

Preamble

The Preamble to the Agreement describes the two countries' desire to improve their economies, to achieve full employment and increase living standards and to strengthen the competitiveness of both countries' firms in the global marketplace.

PART ONE: OBJECTIVES AND SCOPE

The first part includes chapters setting out the objectives and scope of the Agreement and defining key terms.

Chapter One: Objectives and Scope

The Agreement establishes a free trade area (FTA) consistent with the General Agreement on Tariffs and Trade (GATT), the multilateral agreement governing trade relations between 94 countries.

The objectives of the Agreement are to:

- eliminate barriers to trade in goods and services between the two countries;
- facilitate conditions of fair competition;
- significantly liberalize conditions for investment;
- establish effective procedures to administer the Agreement and resolve disputes;
- and lay the foundation for further bilateral and multilateral cooperation.

The federal governments agree to ensure that state, provincial and local governments take necessary actions in areas under their jurisdiction to implement the Agreement. They establish that the Agreement generally will take precedence over pre-existing agreements, except where specified, and they agree to treat each other's goods, services and investment as they treat their own to the extent provided in the Agreement.

Chapter Two: General Definitions

Words critical to the application of the Agreement are defined.

PART TWO: TRADE IN GOODS

Chapters three through twelve deal with trade in goods, building on the GATT and other agreements. Chapters three through six, eleven and twelve apply to all trade in goods. Chapters seven through ten apply to individual sectors.

Chapter Three: Rules of Origin for Goods

The Agreement will eliminate all tariffs between the U.S. and Canada, but each country will maintain its own tariffs on imports from other countries. Because of the disparities between U.S. and Canadian tariff levels, it is necessary to prevent imports from third countries from being shipped through one FTA partner into the other in order to escape the higher tariff.

Rules of origin are used to define those goods entitled to duty free treatment. Goods wholly produced in either the U.S. or Canada will qualify for FTA treatment. Goods containing imported inputs will qualify if they are processed enough to result in one of several specified changes in tariff classification under the internationally agreed Harmonized System; that is, they must be changed in ways that are physically and commercially significant. In some cases, there is the explicit requirement that at least half of the cost of manufacturing the goods must be attributable to Canadian and/or American materials and/or direct costs of processing. Finally, there is a safeguard provision denying FTA treatment to any goods altered merely to circumvent the rules of origin.

Goods that are further processed in a third country before being shipped to their final destination will not qualify for FTA treatment. For example, goods produced by either U.S.- or Canadian-owned maquiladora operations in Mexico will not qualify.

Apparel made from fabric woven in the U.S. or Canada will be duty-free but apparel made from imported fabric will qualify for FTA treatment only up to the following levels:

	Non-Woolen Apparel	Woolen Apparel
	(in million-square-yard equivalent)	
Imports from Canada	50	6
Imports from the U.S.	10.5	1.1

Non-woolen fabric and made-up textile articles, woven or knitted in Canada from yarn produced or obtained in a third country, will qualify for FTA treatment for three years, but only up to an annual level of 30 million square yards.

The two governments will consult regularly to ensure that the rules of origin are operating effectively and to consider changes to the rules where experience suggests changes may be helpful.

Chapter Four: Border Measures

The central element of a free trade area is the elimination of substantially all tariff and nontariff trade barriers.

Tariffs

All bilateral tariffs will be eliminated in stages by January 1, 1998. The removal of tariffs will increase two-way trade and lower costs to consumers in both countries, thereby creating a single U.S.-Canadian market of 265 million people. Approximately 75 percent of bilateral merchandise trade, currently in excess of $120 billion, already moves free of duty. The remaining 25 percent, however, is subject to tariffs. Canadian tariffs average about 9-10 percent, or about twice the U.S. average of approximately 4-5 percent.

The results of the tariff negotiation are expressed in terms of the new Harmonized System (HS) of tariff nomenclature. (If either country fails to adopt the HS, duties will be eliminated by converting the schedule of reductions back to current tariff schedules.) All dutiable products in the HS were assigned to one of the following three staging categories: (1) immediate elimination; (2) five equal, annual cuts (20 percent per year), and (3) ten equal, annual cuts (10 percent per year). In almost all instances, staging on a particular product is the same in both countries. The stages for various commodities were selected in recognition of the fact that industries in both countries will require varying periods of adjustment to changing competitive conditions.

Import-sensitive industries on both sides of the border were generally accorded 10-year staging, which would result in the duty being eliminated by January 1, 1998. These include plastics, rubber, most wood products, lead, zinc, base metal articles, footwear, textiles and apparel, steel, many alcoholic beverages, consumer appliances, precision instruments, watches and most agricultural and fish products.

Immediate duty elimination is scheduled for such products as automatic data processing and related equipment, certain telecommunications equipment, motorcycles, whiskey and rum, some processed fish, raw hides, leather and furs.

All other duties will be phased out by January 1, 1993. Included within this category are paper, furniture, printed

matter, chemicals, after-market automotive parts, precious jewelry, most machines, some musical instruments, and petroleum.

The Agreement provides that tariffs can be reduced faster whenever the two governments agree.

Customs Programs and Procedures

The Agreement eliminates duty drawback for bilateral trade, duty waivers linked to performance requirements (except as provided in the chapter on automotive trade), and the U.S. customs user fee for Canadian merchandise. It authorizes importers and exporters to certify that goods meet the rules set out in the rules of origin chapter and are therefore eligible for FTA tariff treatment. These measures are intended to prevent imports from third countries from benefiting from the FTA.

Duty Drawback: Both countries will end duty drawback on exports to the other as of January 1, 1994, with limited exceptions. Most countries, including the United States and Canada, have duty drawback programs, which provide for the return of duties on imports when they or substituted domestic goods are incorporated in goods subsequently exported. Because of the elimination of bilateral tariffs, continuation of duty drawback between the two parties would allow duty free-entry of third-country imports through the other FTA party and would distort trade and investment decisions.

As an exception to the ban on duty drawback for bilateral trade, the following goods will continue to benefit from the program:

- goods remaining in the same condition on exportation as on importation (but they would not benefit from FTA tariff treatment),
- dutiable goods of the United States or Canada if they are incorporated into, or directly consumed in, the production of goods subsequently exported back to the FTA partner, and
- goods where both parties agree to maintain duty drawback (this category consists of (1) imported citrus products and (2) fabric imported from a third country and made into apparel that is subject to the most-favored-nation (MFN) tariff when exported to the other party).

Also, beginning January 1, 1994, goods withdrawn from a Foreign Trade Zone (FTZ) or benefiting from a similar program will be treated the same whether destined for consumption in the U.S. or Canada. For a good made in a U.S. FTZ, duty must be paid on the value of any foreign components at either the component or

the finished-good tariff rate. Maintaining the full benefits of these programs, like duty drawback programs, would have allowed imports from third countries to enter duty-free through the other FTA party and would distort trade and investment.

Duty Waiver: Neither party will introduce new duty waivers or expand existing ones linked to performance requirements after the later of June 30, 1988 or the date of Congressional approval of the Agreement. Existing programs will be eliminated by January 1, 1998. This provision ends the trade-distorting practice of requiring a firm to buy local inputs or to export output in exchange for a tariff exemption.

The 1998 termination date excludes certain waivers affecting automotive trade, as specified in the section on automotive trade. The countries reserve existing rights under other agreements with respect to the Auto Pact or comparable arrangements. This provision maintains the U.S. right to challenge Canadian performance requirements under GATT rules.

If a party can show that a duty waiver to a specific firm granted on a commercial good hurts its commercial interests, then the party granting this waiver must either make it generally available to any importer or end the program. This provision prevents discrimination among firms.

Customs Fees: Starting on January 1, 1990, the U.S. must cut by 20 percent each year the customs user fee on goods qualifying under the rule of origin of the FTA. The fee on Canadian goods will be eliminated as of January 1, 1994. Neither country may introduce new customs user fee programs to pay for the costs of Customs administration on goods from the other country.

Customs Procedures: The Agreement authorizes the governments to require importers to submit a written declaration of origin based on a written declaration of origin provided by the exporter. It requires each country to make it unlawful for the exporter to provide a false certification. False declarations by either the importer or the exporter could be prosecuted by the government of the country in which the offending business is located. This provision will help avoid fraudulent claims of FTA origin to avoid tariffs.

The Agreement also provides for cooperation on enforcement, consultations on uniform application of the rule of origin, review and appeal procedures for decisions on the rule of origin and consultations on major changes affecting customs administration.

Import and Export Restrictions

Import and export quotas and other restrictions can distort trade flows. The elimination of such barriers is essential to an

effective free trade area. Unless specifically grandfathered by the Agreement or allowed by the GATT, existing quantitative restrictions will be eliminated immediately or according to a timetable. Some specified restrictions that have been exempt from GATT obligations will be eliminated for trade between the U.S. and Canada.

In all cases where quantitative restrictions are prohibited under the Agreement, use of minimum export prices and minimum import prices (except those used to enforce countervailing duty and antidumping orders) also are prohibited.

Where either country prohibits imports from a third country, it may similarly prohibit the pass-through of imports from that country through the FTA partner. This provision preserves the right to enforce embargoes for foreign policy or other reasons (e.g., embargoes against Cuba or Iran).

Export taxes will not be permitted under the Agreement unless the tax is also levied on goods destined for domestic consumption. In addition, where GATT-permitted export restrictions are applied (such as in the event of a short-supply emergency), the restriction must not reduce the proportion of the good that was exported to the FTA partner relative to the total supply of the good prior to the restriction.

Chapter Five: National Treatment

The Agreement incorporates the GATT requirement that, once imported into either country from the other, goods will not be the object of discrimination. This ensures that the elimination of border measures will not simply be replaced by internal measures favoring domestic goods over imports. This rules out higher sales or excise taxes or regulatory requirements on imports. Discrimination against goods from the other country by provinces or states is prohibited even if a province or a state discriminates against goods from other provinces or states.

Chapter Six: Technical Barriers

There are legitimate public policy objectives for which technical regulations and standards are maintained (e.g., to protect human, animal or plant life or health; to preserve the environment; and to protect essential security interests). However, standards measures may work to inhibit trade.

The Agreement builds on current obligations under the GATT Standards Code not to use standards to hinder trade unnecessarily. Certification and testing facilities will receive nondiscriminatory treatment in both countries. We also agree to work to harmonize

our standards where appropriate so that similar products do not have to be made or work in different ways in order to be sold in the other country. Provisions of this chapter do not apply to agricultural goods, which are covered in the chapter on agriculture.

These provisions do not mean that the U.S. will have to adopt the metric system or Canadian standards, or that standards cannot be adopted for legitimate regulatory reasons. The basic rule remains that standards must not create unnecessary obstacles to trade. Obstacles to trade are not created where the demonstrable purpose of standards-related measures is to protect health and safety, environmental, national security and consumer interests. However, such measures must not operate to exclude goods of the other country if they meet these objectives.

Both countries will assure that testing facilities and certification bodies are treated in a nondiscriminatory manner. This paves the way for the recognition by Canadian authorities of U.S. facilities and bodies. This does not require that all testing labs receive accreditation, especially if an individual lab is not qualified in the view of the accrediting authority, but forbids the discrimination against labs on the basis of nationality.

Canada and the United States agree to harmonize (make compatible) federal standards-related measures to the greatest extent possible, and to promote harmonization of private standards. The Agreement does not require that standards and technical regulations be harmonized but provides for it where appropriate. State and private standards-setting bodies are not obligated under any of these provisions.

Both countries will provide for enhanced transparency in the regulatory process. To this end, we will expand our information exchange and guarantee a 60-day comment period on proposed standards-related regulations at all levels. This is important to manufacturers because they need to know about regulatory changes which may affect their products so that they can prepare for the changes, and have some say in them. Similar provisions will apply for state, provincial, and private standards activities at a "best efforts" level.

Processes and production methods are included as standards-related measures subject to the provisions of the Agreement. This provision makes clear that specifying how a product is made is just as much a standards-related measure, and subject to the rules of this section, as specifying how the product should perform.

Both countries will recognize each other's systems for accrediting testing labs. Currently, this is a small program operated by the National Bureau of Standards in the U.S. and the

Canadian Standards Association in Canada to accredit testing labs. Labs accredited under one program will automatically receive recognition in the other country.

Chapter Seven: Agriculture

The U.S. and Canada agree that the achievement of our major trade objectives for our agricultural sectors will require multilateral solutions and accordingly will work together in the Uruguay Round and other fora to liberalize agricultural trade. Nevertheless, the FTA includes provisions providing U.S. and Canadian agricultural producers increased opportunities to market their products in the future with no tariff barriers and with fewer nontariff barriers.

Various barriers to trade in agriculture have arisen in recent years in an attempt to stabilize the agricultural economy. Quotas, import licenses, technical requirements and subsidies have all had a negative effect on trade in agricultural products. The Agreement provides for a number of liberalizing measures in an era of increasing protectionism.

The Agreement provides for semi-annual consultations between the U.S. and Canada on agricultural issues. It also provides that each country shall retain its rights and obligations under the GATT except as otherwise provided.

Tariffs

All agricultural tariffs between the U.S. and Canada will be eliminated within 10 years, thereby facilitating trade and leading to higher efficiency. The agricultural sectors likely to be most affected by the tariff elimination will be fresh fruits and vegetables because some of the highest agricultural tariffs are applied on those products.

Both countries will reserve the right, for 20 years, to apply a temporary duty on designated fresh fruits and vegetables to protect their domestic producers from import surges from the other country. This provision will facilitate a smooth transition to a tariff-free border for both countries, providing a mechanism to prevent unnecessary hardship to fruit and vegetable producers. The temporary duty can only be triggered if (1) the import price falls below 90 percent of the previous five-year average monthly import price for five consecutive days, and (2) the planted acreage in the importing country is not higher than the previous five-year average for the particular fruit or vegetable. The total duty applied under this provision cannot cause the total duty on these products to exceed the lesser of the most-favored-nation (MFN) duty that was in effect for the corresponding season prior to the Agreement or the then current MFN duty. Moreover,

it can be applied only once per year per product for no longer than 180 days. The temporary duty will be removed immediately once the import price exceeds 90 percent of the five-year average for five consecutive days.

Subsidies

The U.S. and Canada have agreed to work together to achieve, on a global basis, the elimination of all subsidies which distort agricultural trade through multilateral negotiations such as the Uruguay Round. This is consistent with the U.S. proposal for agriculture in the Uruguay Round. The FTA partners have agreed not to use export subsidies on agricultural goods exported directly or indirectly to the other country. Each country has also agreed not to sell agricultural goods in the other country at a price below the acquisition price plus handling, storage and other costs. This will prevent the use of practices such as dual pricing. The Agreement will not limit other forms of production subsidies in either country.

Canada has agreed to exclude from the transport rates established under the Western Grain Transportation Act (WGTA) agricultural goods originating in Canada and shipped via West Coast ports for consumption in the U.S. These subsidies were instituted by Canada in 1984 as an expansion of the Crow's Nest Act. It is anticipated that this will primarily affect shipments of millfeed and rapeseed meal into the U.S. Pacific Northwest. The Agreement will not affect WGTA subsidies on shipments through Eastern ports (Thunder Bay), which are not conditioned on export and have been in place since 1897.

These provisions do not prevent imposition of antidumping or countervailing duties.

Access Issues

Grains: Canada has agreed to eliminate import licenses for U.S. wheat, barley, oats and their products when U.S. government support for the particular crop is equal to or less than that of Canada. Each country will calculate its own support level in accordance with a methodology set forth in the Agreement. There is a mechanism to resolve any disagreement over the other country's calculation. When it occurs, the elimination of licenses will provide greater access for the U.S. to the Canadian market for both grains and processed products containing grains.

The Agreement will not affect the ability of either country to legislate changes in domestic support programs for agricultural products. Both countries have also reserved the right to impose or reimpose import restrictions on particular grains if imports increase significantly as a result of a substantial change in either country's support programs for that grain.

Meat: In evidence of the spirit of free trade, the two countries will exempt each other from import quotas applied under their respective meat import laws, unless those imports are frustrating import restrictions on meat imports from other countries. This is a further step ensuring access to each other's markets. This provision will not allow the transshipment or substitution of meat from third countries to circumvent the respective meat import laws. Direct third country access to the U.S. for meat will remain unchanged by the Agreement.

Poultry and Eggs: Canada has agreed to increase the base level for its import quotas for eggs, chicken, turkey and products thereof to a level reflecting total shipments over the last five years. This provision will increase the amount of guaranteed access into Canada. As a result of the tariff reductions, U.S. exporters should have a competitive advantage over other potential supplying countries for the increased quotas.

Sugar: The U.S. has agreed not to impose import restrictions on products from Canada containing ten percent or less sugar for purposes of restricting the sugar content of those products. This provision will not limit the ability of the U.S. to restrict the entry of processed products with higher than ten percent sugar content for purposes of protecting the sugar program.

Technical Regulations

The U.S. and Canada have agreed to work together to harmonize, to the greatest extent possible, technical regulations affecting agricultural, food, beverage and certain related goods. These provisions will facilitate trade for both countries by eliminating, where possible, technical requirements that can amount to non-tariff trade barriers. Specific schedules address the following areas: feeds; fertilizers; seeds; animal health; veterinary drugs; plant health; pesticides; food, beverage and color additives; packaging and labeling; meat, poultry and egg inspection; dairy, fruit and vegetable inspection, and unavoidable contaminants in food and beverages.

Chapter Eight: Wine and Distilled Spirits

Export opportunities for U.S. producers of alcoholic beverages have been limited by measures in Canada that discriminate against the internal sale and distribution of imported products in Canada. The Agreement does not prohibit the regulation of alcoholic beverages in either country, but does eliminate the most significant existing discriminatory practices in Canada and prohibit discrimination against the products of the other country for all new regulations.

Listing measures (limits on brands or types of products that may be sold) must no longer discriminate against wine or distilled spirits of the other country. The lone exception to this requirement is that the province of British Columbia may continue to grant automatic listing to certain estate wineries, provided that listing measures do not otherwise discriminate. Criteria for decisions on listings must be based on normal commercial considerations and listing measures cannot be used to create disguised trade restrictions. Further, listing measures must include procedures for a fair a expeditious appeal when an application for a listing is denied.

The Agreement requires the elimination of discriminatory pricing measures for wine and distilled spirits, including charging a higher markup for U.S. products than locally produced products. Any existing markups must be eliminated when the Agreement is implemented for distilled spirits and must be phased out by January 1, 1995 for wine (with half of the differential to be eliminated by January 1, 1990). Differential pricing measures may only be maintained if the differential between products of the two countries does not exceed the additional cost of service for imported products relative to domestic products. Any such cost of service differential will be subject to audit to ensure it reflects actual higher costs rather than arbitrary protection for local products.

The Agreement prohibits discrimination between Canadian and U.S. wine and distilled spirits in terms of the distribution system for these products. However, on-premise sales by a winery or distillery solely for items produced by them may continue. Private wine store outlets existing on October 4, 1987 in Ontario and British Columbia may continue to discriminate in favor of wine produced in those provinces, but distribution measures in those provinces must otherwise provide nondiscriminatory treatment. Quebec is also allowed to continue to require that wine sold in grocery stores must be bottled in Quebec, as long as alternative outlets for U.S.-bottled wine are provided.

Canada has also agreed to eliminate any measures which require that distilled spirits imported in bulk must be blended with Canadian spirits in order to be sold in Canada.

Canada will recognize Bourbon Whiskey as a distinct product manufactured in the United States and the United States will recognize Canadian Whiskey as a distinctive product of Canada.

Tariffs

Tariffs on whiskey and rum will be eliminated when the Agreement takes effect. Tariffs on other distilled spirits, wine and beer will be phased out in ten equal annual amounts so that duty free status will be obtained on January 1, 1998.

Chapter Nine: Energy

Energy is the single most important input for a developed economy. Without it, there could be no basic industries such as chemicals, steel and other primary metals, autos, aviation, and pulp and paper. All of these industries require energy as a key input and some also manufacture products whose use depends on the availability of energy. Thus, assuring secure supplies of energy at stable and reasonable prices is an essential priority of U.S. economic and trade policy.

The U.S. is the world's largest energy consumer. Although we are also one of the leading producers of energy, the requirements of our economy for various forms of energy are so great that we must import significant amounts of energy to meet these needs. Canada is by far our largest energy supplier. We import more crude oil and petroleum products from Canada than from Saudi Arabia, Venezuela or Mexico. Canada supplies almost all of our natural gas and electricity imports, and more than two-thirds of our uranium imports. In addition, Canada is our largest coal export market. The U.S. and Canada share the world's largest bilateral energy trade relationship, with two-way trade of $10 billion per year or more.

Regrettably, the history of this trade has been marked by a considerable degree of government intervention on both sides, in the form of export restrictions, minimum export price requirements, import fees and quotas, and various other trade restrictions. There have also been domestic programs in each country which have distorted trade both in energy itself and in energy-intensive products such as petrochemicals. While these past actions have often been in response to short-term concerns, they have generally worked to the longer-term disadvantage of both countries. At times, artificially low prices have stimulated excess demand while suppressing supply and thus causing shortages. At other times, artificially high prices have stifled economic activity throughout the economy, especially in energy-intensive industries. Overall, the uncertainty about future government energy trade policies and actions has inhibited investment in energy production and energy consuming industries in both countries.

The Agreement builds on the lessons learned from the past by renouncing excessive government interference in our future energy trade and provides a framework for rational economic development of that trade. Because it will encourage the most efficient system for production, distribution and use of energy between the two countries, it will enhance the energy security of both countries. It should also result in lower overall energy costs over the longer term, which will contribute significantly to the international competitiveness of basic industries in each country.

The energy goods covered by the Agreement include petroleum,

natural gas, coal, electricity, uranium and other nuclear fuels.

The Agreement reaffirms the rights and obligations of both the United States and Canada with respect to the GATT prohibitions on import and export restrictions. Moreover, it makes explicit that both countries interpret the GATT to prohibit minimum export price requirements. In addition, the Agreement extends the GATT discipline to cover a prohibition on export taxes.

In an annex, the Agreement lists three specific changes to conform existing laws to these commitments: (1) The U.S. will exempt Canada from any potential restrictions on enrichment of foreign uranium which might be imposed under Section 161v of the Atomic Energy Act; (2) Canada will exempt the U.S. from its export restrictions on unprocessed uranium; and (3) the U.S. will allow Canada access to a maximum of 50 thousand barrels per day of Alaskan oil currently restricted from export under Section 7(d) of the Export Administration Act, subject to the condition that this oil will be transported to Canada from a suitable location in the Lower 48 States.

The Agreement affirms that, as provided by the GATT, either country may restrict exports where necessary to respond to supply shortages, to maintain a domestic price stabilization program or to prevent exhaustion of a finite energy resource. However, it may impose a restriction only if the restriction (1) does not reduce the proportion of total supply historically available to the other country; (2) does not disrupt the normal channels of supply or mix of energy products; and (3) does not impose a higher price on exports than for comparable domestic sales. What this means is that neither country will treat the buyers or sellers of energy of the other country as "second-class" customers or suppliers. Canada gains assured market access for its energy exports to the U.S., and the U.S. gains assured access to Canadian supplies for its imported energy requirements.

The Agreement provides for consultation in the event either country believes the energy regulatory actions of the other country would directly discriminate against its energy goods or businesses.

An annex to the Agreement lists regulatory changes to be made to conform to the Agreement. Canada will eliminate its electricity export price test that requires the export price to be not significantly less than the least-cost alternative available to the importer. Other Canadian export tests (price tests and "surplus" tests) must be administered in a manner consistent with the principles of the Agreement.

The U.S. will eliminate any discriminatory treatment of British Columbia Hydro vis-a-vis comparably situated U.S. utilities in terms of access to the Bonneville Power Administration Intertie

into the California electricity market. In addition, it is expected that long-term arrangements will be negotiated to assure the development of electricity trade in a mutually beneficial manner consistent with the objectives and principles of the Agreement.

The Agreement recognizes the importance of government incentives for oil and gas resource development to the energy supply security of both countries and, therefore, allows such incentives to be maintained or created. This provision does not prevent the imposition of antidumping or countervailing duties.

The Agreement provides for only quite narrow exceptions to the prohibition on trade restrictions in situations involving national security; these are limited to situations of militarily related national security. The Agreement declares that there is no inconsistency between this Agreement and the obligations of either country under the International Energy Program of the International Energy Agency.

Chapter Ten: Trade in Automotive Goods

Automotive trade accounted for over one-third, or $46 billion, of the total bilateral trade between the U.S. and Canada in 1986. Under the U.S.-Canada Automotive Products Trade Agreement (Auto Pact) of 1965, 95 percent of bilateral automotive trade already moves duty-free. As a result of the FTA, all automotive trade will be duty-free, as long as it meets the rule of origin.

The U.S. and Canada have agreed to the removal of tariff and nontariff barriers and new origin rules designed to assure that the benefits of the FTA accrue to North American auto and auto parts producers. By removing trade and investment distorting practices, the FTA will encourage greater efficiency in motor vehicle production and will provide greater assurance that economic factors determine trade and investment choices between the U.S. and Canada.

Tariffs and Rule of Origin

All tariffs on U.S. and Canadian motor vehicles and parts will be eliminated by January 1, 1998. Most will be phased out over 10 years, but tariffs on aftermarket parts will be eliminated in five years.

The FTA rule of origin which is described in the chapter on rules of origin will apply to all U.S. imports of Canadian automotive products, but only to Canadian imports of U.S. automotive products not entering Canada under the Auto Pact. The FTA rule is based on change in Harmonized System tariff classification and includes a 50 percent U.S.-Canadian direct cost of manufacturing

test for vehicles and specified assembled parts.

Here is how the new FTA rules and the existing Auto Pact will work for imports of autos and parts into the U.S. from Canada:

The FTA rule of origin will replace the rule currently used by the U.S. to implement the Auto Pact. Upon implementation of the FTA, those motor vehicles and original equipment parts currently eligible for duty-free entry under the Auto Pact will be able to enter the U.S. duty-free only if they meet the new FTA rule of origin. Other auto parts that meet the FTA rule of origin will pay the FTA tariff until it is fully eliminated. Motor vehicles and parts that do not meet the FTA rule of origin will pay the full current most-favored-nation (MFN) duty, not the FTA duty.

The new rule of origin is tougher in that it requires that substantial manufacturing costs (materials and direct processing costs) be incurred in the U.S. and/or Canada, while the current test only assures that substantial costs (which can include advertising and overhead) or profits are incurred in the U.S. and/or Canada. This change will help both U.S. and Canadian auto parts manufacturers.

Here is how the new FTA rules and the existing Auto Pact will work for imports of autos and parts into Canada from the U.S.:

Canada's criteria for duty-free access into Canada under the Auto Pact will not change. Qualified producers (those that meet Canada's performance requirements) will continue to be able to import motor vehicles and parts into Canada duty-free from anywhere in the world. However, it has been agreed in the FTA that no new firms may qualify for Auto Pact or Pact-like benefits in Canada, except for the General Motors-Suzuki (CAMI) joint venture, if it qualifies by the 1989 model year.

For companies not meeting Canada's Auto Pact performance requirements, the FTA tariff will apply (until it is fully eliminated) to products imported from the U.S. that meet the FTA rule of origin. Motor vehicles and parts that do not meet the FTA rule of origin will pay the full current most-favored-nation (MFN) duty, not the FTA duty.

Duty Remission

Canada's export-based duty remission program will be eliminated January 1, 1989 on exports to the U.S. and terminated in all cases by January 1, 1998. The export-based duty remission program allows firms in Canada to reduce duties on motor vehicle and part imports in proportion to the Canadian value-added in

their exports of automotive parts.

Canada's production-based duty remissions will end by January 1, 1996 or earlier as contracts expire. Production-based duty remissions allow firms that are not members of the Auto Pact in Canada to avoid duties on automotive imports into Canada as long as they meet Canadian local content requirements.

There will be no new recipients of any Canadian automotive duty remission benefits, and current benefits will not be enhanced. U.S. and Canadian auto parts manufacturers will benefit from the elimination of these measures, which distort trade and investment.

Other Provisions

Canada will phase out its embargo on the importation of used vehicles over five years.

A Select Panel will be established to assess the state of the North American industry and to propose public policy measures and private initiatives to improve its competitiveness in domestic and foreign markets.

Chapter Eleven: Emergency Action

One of the basic tenets of the GATT trading system is that countries should be allowed to take temporary emergency actions restricting imports in order to remedy serious injury caused by increased imports. The drafters of the GATT recognized that a country would be more willing to enter into contractual obligations to reduce its trade barriers if it were able to reimpose the duties when and if imports of a particular product increased to such an extent as to cause injury to one of its industries producing a competing product. Both the U.S. and Canada have established "safeguard" procedures to provide emergency relief to domestic industries injured by imports.

The Agreement provides a two-track system aimed at preserving the existing rights of workers and firms in both countries to gain relief from import-related injury, while at the same time assuring the U.S. and Canadian business communities that the trade expansion created by the FTA will not be suddenly and arbitrarily cut back. Although the U.S. and Canada have not used such actions against each other very often, the possibility of taking actions reduces certainty of market access.

In the United States, domestic producers and workers will have access to relief under special revised provisions of Section 201 of the Trade Act of 1974.

Under the bilateral track, if imports resulting from FTA

duty reductions cause serious injury, the importing country may reinstate the pre-Agreement tariff or current MFN duty (whichever is lower), or suspend duty reductions. This can be done only once per product during the ten-year transition period for no longer than three years. After the transition period, such actions can only be taken by mutual agreement.

Under the global track, the FTA partners retain their GATT rights except that the importing country must exclude the other from an action involving other countries unless that country's imports are substantial and are found to be contributing importantly to the injury from imports. For purposes of this track, imports in the range of five percent to ten percent or less of total imports would normally not be considered substantial. "Contributing importantly" means an important cause, but not necessarily the most important cause.

If the exporting country is initially excluded from an import relief action, the importing country has the right to subsequently bring that country's trade under the import restraint action in the event of a surge in imports from that country. In no event may the exporting country's exports be cut back below the level they reached during a reasonable recent base period.

The FTA partner taking either a bilateral or global action must provide compensation aimed at expanding trade in another product or the exporting FTA partner may take a substantially equivalent retaliatory action.

Disputes arising after an action is taken are subject to binding arbitration under the dispute settlement provisions of the FTA.

Chapter Twelve: Exceptions for Trade in Goods

The Agreement incorporates the provisions of the GATT allowing for exceptions from GATT rules for limited reasons, such as to protect public health or morals or national treasures.

It also specifies certain miscellaneous exceptions from the FTA, including both countries' export controls on logs and existing East Coast Canadian export restrictions on unprocessed fish. Both countries' practices on the internal sale and distribution of beer are also exempted, but amendments to existing practices cannot deviate more from the obligations of the Agreement, and new measures must conform with the FTA.

GATT rights with respect to measures exempted from the FTA are expressly preserved.

PART THREE: GOVERNMENT PROCUREMENT

The general provisions regarding goods trade in Part Two do not apply to purchases of goods by governments.

Chapter Thirteen: Government Procurement

The Agreement expands the size of the government procurement markets which will be open to free and fair competition between U.S. and Canadian suppliers. It also establishes a solid framework for further elimination of "buy national" restrictions that presently inhibit sales by U.S. exporters to Canada.

The procedures used in the Agreement for government purchases build upon the open and competitive principles and procedures of the GATT Government Procurement Code. It improves Procurement Code procedures by establishing a common rule of origin, requiring an effective bid challenge system for all potential suppliers and improving transparency of bid selection, particularly for procurements which are single tendered. The U.S. currently provides for effective bid challenge procedures but Canada does not.

The U.S. and Canadian governments apply various buy national preferences in favor of suppliers of domestic goods. These preferences inhibit -- and in some cases prevent -- competition from foreign products. Under the Agreement, suppliers of goods which are manufactured in the U.S. and Canada and which contain at least 50 percent U.S. or Canadian content will be treated on an equal basis to suppliers of domestic goods for covered procurements.

"Buy American" and "Buy Canadian" restrictions are eliminated on the procurement of goods by U.S. and Canadian entities covered by the GATT Government Procurement Code between the Code threshold (for 1987, $171,000) and an FTA threshold of $25,000, and are subject to the same exclusions and exceptions as those covered by the Code.

Viewed in conjunction with the Procurement Code, the FTA will allow U.S. exporters to compete on a nondiscriminatory basis for all Code-covered procurements over $25,000.

The value of procurement opportunities covered by this chapter is estimated at approximately $3 billion of U.S. procurement and $500 million of Canadian procurement. Previously a majority of Canadian purchases were below the Code threshold, versus a small minority for U.S. entities. Therefore, Canadian entities will open a much higher percentage of procurements under the FTA than will U.S. entities. As a result of the new opportunities offered by Canadian entities under this chapter, procurement opportunities in Canada for U.S. exporters are increased by more

than 100 percent.

Principles are established for bid challenge procedures. These include a requirement that a reviewing authority with no substantial interest in the outcome of the procurement be responsible for deciding bid challenges. Suppliers may protest government procedures on their own initiative and receive timely settlement of complaints.

Each government must provide transparency in its procurement process. Public notice must be provided of all the criteria it intends to use in evaluating a bid (including offsets) and the award must be based on those criteria.

Within one year after the conclusion of the current multilateral negotiations on the GATT Procurement Code, there will be an opportunity to improve and expand coverage of this chapter by further negotiations with Canada.

PART FOUR: SERVICES, INVESTMENT AND TEMPORARY ENTRY

GATT rules cover trade in goods only. Services and investment are not covered. The FTA goes beyond traditional GATT areas to establish rules in these areas that break new ground and set an important precedent for the Uruguay Round of multilateral trade negotiations, in which GATT countries are considering whether to extend GATT disciplines to these new areas.

Chapter Fourteen: Services

The Agreement breaks new ground by providing rules governing trade and investment in services industries. Both the U.S. and Canada have relatively open markets for services. The Agreement will ensure continued openness by providing that future laws and regulations will not discriminate against services providers of the other country.

A wide range of services industry sectors are covered by the agreement, including: construction, tourism, insurance, telecommunications-network-based enhanced services and computer services, some professional services, services relating to mining and agriculture, wholesale and retail trade, management services and other business services. Transportation services are not covered.

Future U.S. and Canadian government measures such as laws, regulations or licensing requirements affecting services trade and investment must not have the purpose or effect of discriminating between the services providers of either country. The right of establishment, the right to sell across the border, and greater

transparency in regulations are also provided. The Agreement does not affect subsidies for or government procurement of services.

There are annexes which clarify the application of the services agreement to architecture, tourism, and telecommunications-network-based enhanced services and computer services.

In architecture, both sides will review the work of professional organizations to develop mutually acceptable standards.

In telecommunications-network-based enhanced services and computer services, the Agreement ensures the future development of an open and competitive market including access to and use of the basic telecommunications network.

In tourism, the Agreement ensures continued open markets for tourists and tourism service providers.

The Agreement provides the opportunity for future negotiations to increase liberalization, sectoral coverage and other obligations.

Chapter Fifteen: Temporary Entry for Business Persons

The U.S. and Canada have agreed that as a part of the special trading relationship established by the Agreement, it is desirable to facilitate temporary entry for business persons into the territory of each country on a reciprocal basis. The Agreement and immigration laws of both countries will provide transparent criteria and procedures for temporary entry of certain persons who conduct trade in goods and services as well as investment activities, while maintaining necessary provisions to ensure border security and protect indigenous labor and permanent employment. These provisions facilitate entry for citizens of each country into the territory of the other on both a short- and long-term basis depending on the type of commercial activity involved.

The two countries agree to provide temporary entry for business persons through transparent laws and regulations and to provide explanatory materials in order to enable business persons to become acquainted with such laws and regulations. These provisions will be applied in a manner that provides the desired entry without undue delay or impairment in the conduct of trade and investment under the Agreement.

The countries will exchange data on temporary entry and consult at least once a year concerning the operation of the Agreement and consider provisions that may further enhance temporary entry, including amendments and additions to coverage of persons under the Agreement.

Should a dispute arise concerning the provisions of this chapter, it may be referred to the dispute resolution provisions of the Agreement if the matter involves a pattern of practice and available administrative remedies have been exhausted.

Coverage of persons involves Business Visitors and Professionals who shall be admitted without prior approval procedures, petitions, labor certification tests, or other procedures having similar effect, as well as Intra-Company Transferees and Traders and Investors who will no longer face labor certification tests or other similar procedures.

Business Visitors

A business person engaged in one of the covered occupations and entering for the described purpose shall be granted entry under Schedule 1 of the Agreement. This schedule defines the persons involved in a number of business areas and the activities undertaken. The approach provides transparency and specificity to a number of areas of business activity that have in the past been unclear or subject to conflicting interpretation.

One important provision allows persons of either country to provide after-sales service for the length of the contract or warranty period on commercial or industrial machinery and equipment or computer software that has been purchased outside its territory. This allows firms to better provide after-sales service functions that are often a necessary component in the sale of complex machinery, equipment and computer software.

Traders and Investors

A business person seeking temporary entry in order to carry on substantial trade in goods or services in a capacity that involves supervisory, executive or essential skills, or to direct the operations of an enterprise in which the person has invested, shall be granted temporary entry under new, liberalized procedures in the Agreement. The new provisions provide business persons the assurance that after they have received an initial certification, they may freely enter as often as their business needs require.

Professionals

The FTA partners will admit persons who are members of certain professions and engaged in their related business activities. Coverage includes the generally recognized professions such as engineers, architects, and certain scientific and technical specialties. The Agreement also covers newer professions such as management consultants. Revised procedures should provide improved processing of entry requests.

Intra-Company Transferees

Intra-company transferees, when engaged in managerial or executive activities or possessing specialized knowledge, will be admitted. Requirements that certain companies train replacement personnel have been removed.

Chapter Sixteen: Investment

For U.S. investment in Canada, the Agreement builds on the substantial liberalization measures already taken by the present Canadian government. It freezes those measures in place and bars most new measures which would adversely affect U.S. investment.

For its part, the U.S. will continue its open investment climate for Canadian investors in accord with the basic principles set out in the President's Investment Policy Statement of September 9, 1983.

The Basic Rules

The Agreement sets out four basic rules to govern the treatment of investors from each country:

National Treatment and Non-discrimination: Each party is to treat investors of the other party at least as favorably as its own investors (in like circumstances) with respect to the establishment of new businesses and the acquisition of existing business, and with respect to the conduct, operation and sale of business enterprises located in its territory. Neither party, thus, can require that investors sell investments by reason of their nationality, or that their own nationals must hold a minimum level of equity in investments made by investors of the other country.

Elimination of Performance Requirements: Neither party, when permitting an investment in its territory, or when regulating an investment, may impose or enforce trade-distorting measures which require an investor to export a certain amount of goods, or substitute locally produced goods for imports, or buy or give a preference to locally produced goods. (This rule also applies to third country investors when such measures could significantly affect U.S.-Canadian trade.)

Expropriation Only in Accordance with International Law Standards: Neither party may directly or indirectly expropriate the holding of an investor from the other country except in accordance with generally accepted international law standards which, inter alia, require payment of prompt, adequate and effective compensation at the fair market value of the expropriated properties.

Free Transfer: Neither party may prevent an investor from transferring profits, earnings from an investment, or sales and liquidation proceeds (with only limited exceptions relating, for example, to limitations on dividend payments set by bankruptcy laws.)

Exceptions

Certain measures are excluded, notably those involving transportation services. The provision of financial services (except certain insurance measures) are covered elsewhere in the Agreement.

In general, existing measures are grandfathered, such as the existing U.S. laws restricting foreign investment in such fields as atomic energy and communications and the Canadian laws restricting foreign investment in communications. Those measures may not be made more restrictive.

The oil and gas and uranium mining industries were subject to published policies under the Investment Canada Act prior to October 3, 1987; the application of these policies and of the thresholds of the Agreement to these industries is to be clarified by an exchange of letters.

Liberalization of Entry and Exit Restrictions

The Agreement does achieve major liberalization of Canada's Investment Canada Act, which is Canada's principal mechanism for regulating investment into Canada and, a fortiori, sales of Canadian businesses to foreign investors.

Canada's threshold for review of direct acquisitions by U.S. investors is raised to C$150 million (in constant 1992 Canadian dollars) after three years from the date of entry into force of the FTA.

Canada will no longer review indirect acquisitions after the end of that three-year period.

Canada also will apply these higher thresholds to an acquisition by a foreign investor when a U.S. investor seeks to sell its Canadian business.

Canada will offer to buy, at a fair open market price (determined by independent assessment) any business enterprise in Canada in the cultural industry which Canada requires be divested when reviewing an indirect acquisition. If, for example, a U.S. firm seeks to buy another U.S. firm with a Canadian subsidiary in a cultural industry, Canada may require the new owner to divest the cultural subsidiary to a Canadian purchaser. (The FTA exempts cultural industries generally from the Agreement, and

therefore from the Chapter.)

Canada will no longer impose certain trade-distorting performance requirements under the Investment Canada Act. These are requirements to export, substitute local production for imports, source or purchase locally, or achieve specified domestic content.

PART FIVE: FINANCIAL SERVICES

Chapter Seventeen: Financial Services

This is the first U.S. bilateral agreement covering the entire financial sector. It removes essentially all existing discrimination faced by U.S. financial institutions operating in Canada, allows the flexibility to acquire Canadian financial services firms, improves access between our markets, and allows financial firms on both sides of the border to compete on a more equal basis. Canadian financial institutions will continue to enjoy the current treatment and open access they now receive in the U.S. financial market.

The Agreement covers all current and future laws, regulations, and practices relating to financial institutions in both countries. Financial institutions include commercial banks, investment banks, trust and loan companies, savings-and-loan institutions, certain activities of insurance companies, and other institutions so designated under the laws of each country. (Financial services offered by nonfinancial institutions and insurance services are covered elsewhere in the Agreement.)

The domestic assets of foreign bank subsidiaries operating in Canada (the "closely held" or Schedule B banks) are currently limited to 16 percent of all domestic assets of the Canadian banking system. Foreign bank subsidiaries also face individual capital limits and other restraints such as the sale of loans to the parent bank. Under this agreement, U.S. commercial bank subsidiaries will be exempt from the current restrictions on market share, asset growth, and capital expansion, in the same way that Canadian banks are free from these restraints. U.S. commercial banks will also be allowed to establish or acquire securities firms or federally-regulated Canadian insurance and trust companies, again in the same manner as Canadian banks.

Under the current proposals for financial market reform in Canada, foreign insurance companies have perhaps been the most disadvantaged because of the so-called "10/25" rule. This prevents a nonresident from acquiring more than 10 percent ownership of a Canadian insurance company, or trust and loan company; total nonresident ownership is limited to 25 percent. Under the

Agreement, U.S. insurance firms will now receive the same rights as Canadian insurance companies to diversify in the financial sector by establishing or acquiring federally-regulated insurance companies, trust companies, Schedule B banks, or securities firms.

While Ontario, Quebec, and other provinces have liberalized their securities markets and opened them to foreign investors, the federal government implemented a policy of reciprocity which has held up the applications for entry by U.S. securities firms and banks. Under the Agreement, these applications will be reviewed on a prudential basis, just as for Canadian firms, rather than on a reciprocity basis. U.S. securities firms established in Canada will have the ability to diversify through a holding company structure into other financial activities such as banking and insurance.

Under the Agreement, the U.S. also made a number of specific commitments, although there were no national treatment barriers in the United States to eliminate. The U.S. agreed to guarantee the right of Canadian banks to retain their multi-state branches that were grandfathered under the International Banking Act of 1978. If the Glass-Steagall Act, which separates commercial and investment banking in the U.S., is amended, the U.S. will extend these benefits to Canadian financial institutions in the U.S. Such guarantees have never before been extended to any other country.

The U.S. responded to Canadian concerns regarding the treatment of their banks and securities firms which merge in Canada, but have operations in the U.S., by agreeing to allow Canadian banks (as well as U.S. and other foreign banks) in the U.S. to underwrite and deal in debt obligations fully backed by Canada or its political subdivisions. This is a new power that is consistent with the existing ability of banks to underwrite and deal in securities of the U.S. Government and its political subdivisions, yet does not undermine the basic tenets of the Glass-Steagall Act.

The new power enables Canadian firms to take advantage of liberalization in Canada, while retaining the most important securities activities in the U.S. One of the side effects of this new power will be a direct benefit to the Canadian federal government, the Agent Crown corporations, the provincial governments, and the municipal governments in Canada. Since, as a result of the agreement, their debt will be underwritten and traded by more firms in the U.S., it offers the potential for a wider, deeper market and, therefore, lower borrowing costs.

In addition to these specific commitments, both the U.S. and Canada have made general commitments. The U.S. has agreed to continue the current treatment provided to Canadian financial

institutions established in the U.S. as long as Canada continues to liberalize its financial markets and to extend the benefits to U.S. financial institutions established in Canada. Canada has made an analogous commitment. The Agreement establishes a formal consultative mechanism between the U.S. Department of the Treasury and the Canadian Department of Finance to oversee this liberalization and deal with any other financial services issues.

PART SIX: INSTITUTIONAL PROVISIONS

This part establishes procedures for general dispute settlement and the special arrangements for antidumping and countervailing duties.

Chapter Eighteen: Institutional Provisions

The Agreement provides for a consultative mechanism to avoid disputes and resolve any disagreements quickly and easily, with provisions for use of binational panels of independent experts for unresolved disputes.

The Canada-United States Trade Commission is established to supervise the implementation of the Agreement and to resolve disputes on all matters except financial services, antidumping and countervailing duties. The Commission will be composed of Cabinet-level representatives of both governments and will operate by consensus.

Either government may request consultations and will attempt to avoid or resolve disputes through consultations. If consultations are unsuccessful, either government may request a meeting of the Commission. The Commission may use a mediator or draw on expert advice in seeking a bilateral settlement. If not resolved in this manner, the Commission may agree to refer the matter to binding arbitration or a panel can be established at the request of either party.

A panel will be appointed from a roster maintained by the Commission. Two panelists will be appointed by each government and a fifth, the chairman, will be jointly agreed, selected by the other four, or chosen by lot. The panel, after hearing the arguments of both sides, will report its findings and recommendations to the Commission. If either side believes the panel has erred, it may present written objections to the panel, which may reconsider and revise its final report.

After receiving the panel's final report, the Commission will agree on the resolution of the dispute, whenever possible removing the nonconforming measure rather than paying compensation. If the Commission cannot agree and a government believes its

fundamental rights or benefits under the FTA are being impaired, that government may withdraw equivalent benefits from the other.

Chapter Nineteen: Binational Dispute Settlement in Antidumping and Countervailing Duty Cases:

The U.S.and Canada will continue to apply their own national antidumping (AD) and countervailing duty (CVD) laws to goods imported from the other country. In such cases, independent binational panels acting in place of national courts will expeditiously review final AD and CVD determinations to decide whether they are consistent with the AD or CVD law of the country that made the determination.

The panel procedure -- combining independent review and judicial standards with an FTA-created forum and a tight schedule -- will allow quick resolution of AD/CVD issues between the two countries without unnecessary bilateral trade friction, yet preserve the rights of injured companies to obtain relief from unfair trade practices. The panel mechanism will remain in place for up to seven years, while a bilateral working group attempts to develop new approaches to unfair pricing and government subsidies that would ensure effective discipline over unfair trade practices and minimize unfair trade disputes within the new free trade area.

Under the FTA's panel procedure, independent binational panels will review final AD and CVD determinations by the relevant administrative agencies of the U.S. and Canada. In one FTA country's AD or CVD case involving a product from the other FTA country, panels would substitute for national courts unless, in a particular case, no party preferred panel to court review. Panel decisions would be binding as a matter of international law with respect to the particular matter reviewed. This system of review would apply to final determinations made by an administrative agency after the date of entry into force of the Agreement. It will not affect either country's judicial review of AD/CVD cases concerning imports from third countries.

In the U.S., the Department of Commerce makes final dumping or subsidy determinations in AD/CVD investigations and reviews of AD/CVD orders, and the U.S. International Trade Commission makes final determinations in AD/CVD investigations as to whether a U.S. industry has been injured. These determinations in a U.S. case involving goods from Canada, and Canada's parallel determinations in a Canadian case involving goods from the U.S., will be subject to panel review. This symmetry in the panel review process will enhance the rights of U.S. producers and exporters, since judicial review of some Canadian dumping and subsidy findings is not now available.

The panels will review final AD/CVD determinations solely to determine, based on the administrative record, whether the relevant administrative agency applied its national AD/CVD law correctly. The panels will employ the same standard of review and the same general legal principles as would a domestic court. If a panel finds that the administrative agency applied the law correctly, it will affirm the determination. Otherwise, it will send the case back for a corrected determination.

Although formally only the two governments may invoke the panel review process, the governments will automatically trigger panel review at the request of any person who otherwise could have challenged the determination in court. Parties to the case or their lawyers will argue their positions before the panel, as they would before a court. Sensitive business information will be protected against unlawful disclosure in the panel review process.

Panelists will generally be selected from a roster to be developed by the two governments. Individuals on the roster will be U.S. or Canadian citizens chosen for objectivity, reliability, sound judgment, and general familiarity with international trade law. To ensure impartiality, roster members, with the exception of judges, may not be government officials. Individual panels will have five members, the U.S. and Canada each appointing two. The fifth panelist will be chosen by agreement between the two governments, among the four panelists, or by lot from the roster. Because panels will be performing a judicial-like function, a majority of the panelists including the chairman must be attorneys.

The two governments expect the panel system to work smoothly and effectively. As a safeguard against an impropriety or gross panel error that could threaten the integrity of the process, however, the FTA provides for an "extraordinary challenge procedure." In carefully defined circumstances, either government could appeal a panel's decision to a three-member committee of U.S. and Canadian judges or former judges. The committee would make a prompt decision to affirm, vacate, or remand the panel's decision.

The Agreement also establishes a procedure for advisory panel review of amendments to U.S. or Canadian AD or CVD laws enacted after the FTA enters into force. The two governments will consult about any proposed AD/CVD amendments applicable to the other country's goods. If one country changes its AD or CVD statutes, the other government may request that a panel be established to give an advisory opinion on whether the amendment is consistent with the GATT and the FTA.

If the panel views the amendment as inconsistent with the GATT or the Agreement and recommends modifications to eliminate the inconsistency, the two governments will consult to reach a solution, which could include seeking remedial legislation. If

no agreement is reached or remedial legislation agreed on is not enacted, the complaining government may enact a comparable amendment to its AD/CVD law or terminate the Agreement upon 60 days' written notice.

PART SEVEN: OTHER PROVISIONS

Chapter Twenty: Other Provisions

Provisions which did not fall logically into other chapters appear here. Included are some particular sectoral issues, as well as some general rules affecting the overall Agreement.

Softwood Lumber

The 1986 Memorandum of Understanding (MOU) on Softwood Lumber is grandfathered. The MOU resolved a countervailing duty case brought by the U.S. softwood lumber industry against Canada's lumber exports. Canada agreed to apply a 15 percent export tax on lumber until such time as the provincial stumpage pricing practices were altered.

Plywood

Canada will decide by March 15, 1988 whether to allow the use of U.S. standard C-D grade plywood in housing it finances. If so, U.S. tariff concessions on plywood and particleboard will begin to be implemented on January 1, 1989. If not, a panel of experts will examine the issue and the governments will consult on how to implement the tariff concessions.

Culture

It has been the policy of Canadian governments to promote cultural activities with the goal of fostering Canada's unique cultural heritage. Some of these measures have had trade effects and an adverse impact on U.S. commercial interests.

The U.S. recognizes the importance to Canada of maintaining its cultural identity. At the same time, however, the U.S. wants to ensure that Canadian cultural policies do not constitute a discriminatory and unnecessary barrier to U.S. trade.

Certain "cultural industries" are exempt from the provisions of the FTA. This allows either country to maintain programs that would otherwise be inconsistent with the Agreement. However, the other country retains the right to retaliate with measures of equivalent commercial effect whenever the cultural exemption hurts that country's commercial interests. The right to take countermeasures is not subject to prior invocation of the Agreement's

dispute settlement provisions.

Cultural activities exempted from the FTA include the publication, sale, distribution or exhibition of: books, magazines, and newspapers; film and video recordings; audio or video music recordings; and also radio, television and cable dissemination. Of course, tariffs will be eliminated on all these products.

In addition, Canada has agreed to alter a number of practices that discriminate against U.S. businesses. These new steps include elimination of a print-in-Canada requirement for tax benefits and increased copyright protection for the retransmission of commercial broadcasts.

Other Provisions

The two governments agreed that if either takes trade actions to counteract a serious deterioration in its balance-of-payments position, it will do so consistent with its rights and obligations under the GATT, the International Monetary Fund and the Organization for Economic Cooperation and Development.

The precedence of the 1980 tax convention is stated because the Agreement takes precedence over other agreements unless specified.

The standard GATT national security disclaimer is adopted, except for energy and government procurement. For energy, there is a more limited national security provision specified in the energy chapter. For government procurement, the GATT Government Procurement Code provision is adopted.

The establishment of government monopolies is expressly permitted, but it must be done in a way that does not violate the principles of the Agreement.

The Agreement states that if measures not expressly prohibited are deemed nevertheless to nullify or impair benefits reasonably expected under the Agreement, dispute settlement can be invoked.

PART EIGHT: FINAL PROVISIONS

Chapter Twenty-One: Final Provisions

The two governments agree to exchange necessary statistical information and to publish information to facilitate implementation of the Agreement. The Agreement will become effective January 1, 1989. It can be amended by mutual agreement and can be terminated by either party with six months' notice.

For Further Information, Contact: Area Code 202

The Office of the U.S. Trade Representative
- Office of Canada.....395-5663
- Office of Public Affairs.....395-3230

Department of Commerce
- Office of Canada.....377-3101
- Office of Public Affairs.....377-3808

Department of Agriculture
- Office of International Trade Policy.....382-1338
- Office of the Press Secretary.....447-4623

Department of the Treasury
- Office of International Trade.....566-8107
- Office of International Investment.....566-5811
- Canada Desk (Financial Services).....566-2747

Department of State
- Bureau of Economic and Business Affairs
  - Office of Trade.....647-1718
  - Office of Public Affairs.....647-1942
- Bureau of European and Canadian Affairs
  - Office of Canadian Affairs.....647-1097

Department of Labor
- Office of International Economic Affairs.....523-6096
- Office of Public Affairs.....523-9711

Department of Energy
- Office of Int'l Affairs and Energy Emergencies....586-5800

Senator HEFLIN. Next is M. Jean Anderson.

Ms. ANDERSON. Thank you, Mr. Chairman.

I am very pleased on behalf of the International Trade Administration of the Department of Commerce to testify today on the FTA provisions for binational panel review in anti-dumping and countervailing duty cases. I want to focus on what we negotiated and what we didn't negotiate in that area, but first it might be helpful to put the panel process in the context of our anti-dumping and countervailing duty laws briefly and in the context of U.S. judicial review in those kinds of cases and in the context of the FTA negotiations themselves.

Our anti-dumping and countervailing duty laws which, to save time in this hearing, I'll call the AD and CVD laws, provide remedies to industries injured by unfairly priced or subsidized imports. Based on a petition filed by a U.S. industry, the Commerce Department investigates dumping or subsidies, and the U.S. International Trade Commission investigates injury. If both agencies reach final affirmative determination, Commerce issues a dumping or countervail order and instructs Customs to collect duties to compensate for the dumping or subsidies.

Now, there has always been some kind of judicial review in the AD/CVD area, but only since the Trade Agreements Act of 1979 has judicial review been readily accessible and heavily used. Under that Act and the Customs Court Act of 1980, challenges to Commerce or ITC final determinations go to the U.S. Court of International Trade, the U.S. Court of Appeals for the Federal Circuit, and extremely rarely, by certiorari to the Supreme Court.

Typically, court review of AD/CVD determinations is initiated by foreign exporters, U.S. importers, or U.S. producers who are dissatisfied with a particular Commerce or ITC determination. In fact, the Commerce Department is usually sued by all of those people in a single case.

Like the underlying administrative proceedings, AD and CVD litigation is highly technical, involving not only the AD/CVD laws themselves, and international law, but also complex issues of accounting and economics.

When the Court of International Trade rules on a Commerce or ITC determination, it either upholds the agency or remands the case to the agency for a new decision. It does not tell Commerce or the ITC what the new determination must be or what method the agency must use to reach it. For example, if Commerce found a 10 percent subsidy, the court would not decide the rate should have been 5 percent or 15 percent, or that there was no subsidy at all. Instead the court might rule that Commerce should take certain information into account differently, or that it misinterpreted the law in making a particular accounting decision. Commerce would then redo its determination in light of the court decision.

In the free trade negotiations with Canada, a key Canadian objective was to devise new approaches to dumping and subsidies that could replace these AD/CVD laws in the free trade area. With the advice of the private sector and many members of Congress, U.S. negotiators were unwilling to exempt Canada from our CVD law without ensuring stronger enforceable discipline over Canadian subsidies. Despite very intense negotiations, it proved impossible to

agree on subsidies discipline and new approaches to unfair trade practices in the short time frame of the FTA negotiations.

The two governments agreed instead to retain the existing national AD/CVD laws and procedures. But there was a perception in Canada when we dispute but nonetheless important as a perception that administrative AD/CVD determinations were open to being influenced politically. So to provide reassurance that both countries' AD/CVD laws are properly administered, the two governments also agreed that during the early years of the FTA, while a bilateral working group continues to seek subsidies discipline and better ways of dealing with unfair pricing and subsidies, final decisions under the AD/CVD laws of both countries would be reviewed not by national courts but by independent binational panels.

Now, it is very important to understand that eliminating review of United States-Canada AD/CVD cases by national courts was not the goal of either government.

Court decisions were not ever seen as the problem. Rather, the two governments created the panel procedure, combining independent review and judicial standards with an FTA-created forum and a tight schedule as an interim mechanism that preserves private rights to relief from unfair trade practices, but allows quick resolution of bilateral AD/CVD issues while we work on an improved FTA approach to dumping and subsidies.

It is also important to have some perspective on the numbers here. Of over 700 U.S. AD/CVD cases filed since 1980, only 31 involved Canada, and only 13 of those 31 led to orders. On average, that is fewer than two U.S. orders against Canada annually. And those orders cover less than $600 million of our approximately $70 billion in annual imports from Canada.

United States-Canada cases are also only a small fraction, less than 6 percent, of the AD/CVD appeals before the Court of International Trade and less than 1 percent of the total cases before the Court of International Trade.

Now, with that background, how does the binational process work?

Panel review is not, of course, court review. But we negotiated a panel process patterned as closely as possible on review by the Court of International Trade. For example, panel review will be based solely on the administrative record. In a U.S. case, the panel will apply U.S. AD/CVD law which has been incorporated into the FTA for this purpose, including the statute, the legislative history, regulations, administrative practice, and U.S. judicial precedent. The panel would apply the same standard of judicial review as the CIT would apply.

The panel cannot substitute its judgment for the agencies, either. It can affirm the decision, or can conclude that the agency made a mistake, and in the latter case, Commerce or the ITC would make a new determination just as they do on remand from the CIT.

The process we negotiated also preserves the rights private parties have in review before United States and Canadian courts. For example, anyone who would have had standing to seek CIT review will have standing to obtain panel review. Private parties or their counsel will argue their case before the panel. Private parties business proprietary information which is often critical to AD/CVD

analysis will be protected against unlawful disclosure. And very importantly, in Canadian cases against U.S. produces, U.S. producers and exporters will have greater rights to panel review of Canadian decisions than they now have in Canadian courts.

Indeed, under current Canadian law, the equivalent of the Commerce Department's dumping or subsidy decision is not reviewable at all in Canadian courts, and the Canadian equivalent of our administrative reviews in dumping and countervail cases, although reviewable, cannot be reviewed on application by a U.S. exporter, but only the importer in Canada would have standing.

Under the FTA, U.S. exporters can get review of those decisions.

In addition under the agreement panelists must be selected for the same kinds of qualities we seek in judges—good character, objectivity, sound judgment, and knowledge of the law. Panelists must also be independent, unaffiliated with either government and free of any interests or affiliations that might create even the appearance of a conflict of interest. They will be subject to a code of conduct based on existing codes of conduct for judges and arbitrators.

Not only will panelists have to be like judges, but panels will have to operate much like courts, under rules patterned on judicial rules of appellate procedure.

And while the two governments expect this panel review system to work smoothly, the FTA also provides a safety valve, an extraordinary appeal of panel decisions to a binational committee composed of present or former judges.

The panel process is described in greater detail in my written statement, so let me just make two last points.

First, the FTA binational panel system does not create a new source of United States law or a divergent interpretation of United States law in Canadian cases. Given the criteria for selecting panelists and the fact that panels will apply U.S. law in U.S. cases, we would expect panel and court decisions to be consistent.

But also the agreement provides that panel decisions are binding only with respect to the particular matter before the panel. Consequently, neither a later panel nor a United States court reviewing a non-Canadian case would be obliged to follow the panel's decision.

Of course, a U.S. court might choose to adopt a panel's persuasive reasoning but if, after a panel decision, a United States court interpreted U.S. law differently, the subsequent panel would be bound by the court decision. In other words, when U.S. courts interpret U.S. law, that controls.

Second, the binational panel process does not eliminate court review of constitutional claims. Indeed, the implementing bill we are drafting with this and other committees in the Congress makes specific provision to ensure that constitutional claims, whether challenging the panel process itself or raising constitutional claims that might arise in a particular dumping or countervail proceeding, will be heard by Article III courts.

In sum, we think the binational panel process can work and work well. It preserves full access for U.S. industry to our AD/CVD laws and provides independent quasi-judicial review of agency determinations while the two governments seek a better unfair trade

regime for the free trade area. We are confident that the bill the administration and the Congress are working together on will resolve any concerns about this process.

That concludes my oral remarks; I'd be happy to answer your questions.

[The statement follows:]

TESTIMONY OF
M. JEAN ANDERSON
CHIEF COUNSEL FOR INTERNATIONAL TRADE
U.S. DEPARTMENT OF COMMERCE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
MAY 20, 1988

I am pleased to have the opportunity, on behalf of the International Trade Administration of the Department of Commerce, to testify before you today on the U.S.-Canada Free Trade Agreement provisions for binational panel review of antidumping and countervailing duty cases.

Since it was first announced last October, the FTA's somewhat novel system of binational panel review of antidumping (AD) and countervailing duty (CVD) determinations has attracted some interest in the legal community. It has received widespread support on both legal and policy grounds. But a few concerns have been raised and some confusion has emerged as to what the binational panel provisions are all about. We hope today to put some of these concerns and confusion to rest by explaining exactly what the binational panel mechanism is, and what it is not.

Briefly, the FTA creates a procedure to substitute for judicial review, in both the United States and Canada, of administrative AD and CVD determinations made by U.S. and Canadian government agencies in cases involving products from the other FTA country. In place of court review, the FTA provides for quasi-judicial review by independent panels composed of American and Canadian experts. Applying the standard of review that a court of the importing country would apply, the panels would render opinions on whether the agency correctly applied the law of the importing country. For example, in a U.S. antidumping case against Canadian exports, the panel would apply the U.S. antidumping law -- which for this purpose has been incorporated by reference in the FTA -- and the U.S. standard of review in AD cases. The panel system is to be an interim system, in place for up to seven years, during which time the United States and Canada will attempt to devise alternative approaches for handling dumping and subsidies within the Free Trade Area.

To clarify what the binational panel process is and isn't, it must be put in the context of the AD/CVD laws, U.S. judicial review of AD/CVD cases, and the FTA negotiations.

The AD and CVD Laws

The United States and Canada have very similar AD and CVD laws.[1] The AD law provides a remedy to industries injured by imports that are sold at discriminatory or below-cost prices. The CVD law provides a remedy to industries injured by imports that are subsidized by foreign governments. Under both laws, the remedy is an additional duty assessed upon imports to compensate for the dumping or subsidization.

The U.S. procedures are similar under both the AD and the CVD laws. A case typically begins when a U.S. firm or industry files a petition with the Department of Commerce alleging that it is being injured by the dumping or subsidization of a particular imported product from a particular country. If the petition fulfills the statutory and regulatory requirements, Commerce and the U.S. International Trade Commission ("ITC") then initiate investigations, Commerce investigating dumping or subsidization and the ITC investigating injury to a U.S. industry. Both agencies make preliminary and final determinations. If either of the final determinations is negative, the investigation terminates. However, if the final determinations are both affirmative, Commerce issues an AD or CVD order and instructs the U.S. Customs Service to collect antidumping or countervailing duties on the affected merchandise. For future entries, these are only estimated duties. Thereafter, upon request, Commerce conducts administrative reviews to determine whether the estimated duties collected should be adjusted (and a new estimated duty rate set) to reflect changes in the amount of dumping or subsidy.

The duties collected go into general Treasury funds, not to the affected U.S. industry. However, these special duties offset any unfair competitive advantage that a foreign exporter has gained through dumping or subsidies.

AD and CVD investigations are highly technical, often involving difficult questions of economics or accounting. In addition, the current substantive and procedural provisions of the AD/CVD laws are based on provisions of international law -- the General Agreement on Tariffs and Trade ("GATT") and the GATT Agreements on antidumping and subsidies, to which both the United States and Canada are signatories.

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[1] The U.S. AD and CVD laws are contained in title VII of the Tariff Act of 1930, as amended. 19 U.S.C. §§ 1671 et seq. The Canadian AD and CVD laws are found in Canada's Special Import Measures Act.

U.S. Judicial Review of AD and CVD Cases

The AD law dates back to 1922, and the CVD law even earlier. Although some form of judicial review for determinations under these laws always has existed, it was not until the enactment of the Trade Agreements Act of 1979 that judicial review became readily accessible and heavily used. The Trade Agreements Act provided that essentially all final determinations made in the course of an AD or CVD proceeding by Commerce or the ITC were subject to review by the U.S. Customs Court.[2] The Customs Courts Act of 1980 rounded out these changes by making exclusive the review by the Customs Court of import transactions, expanding its remedial powers to be consistent with those of other Article III courts, and by changing its name to the U.S. Court of International Trade ("CIT"). Under the current system, challenges to Commerce or ITC final determinations go to the CIT, with an appeal to the U.S. Court of Appeals for the Federal Circuit, and certiorari to the U.S. Supreme Court. For most determinations, the standard of review is whether the determination is unsupported by substantial evidence on the record, or otherwise not in accordance with law.[3]

Typically, judicial review in AD or CVD cases is initiated by foreign exporters, U.S. importers, or U.S. producers who are dissatisfied with a particular Commerce or ITC determination. Indeed, Commerce often is sued by exporters, importers, and U.S. producers, and typically on several grounds. For example, a foreign exporter might claim that Commerce erred in finding dumping or subsidization, that the amount of dumping or subsidization found was too high, or that the ITC erred in finding injury to a U.S. industry. Like the underlying administrative proceedings, AD and CVD litigation is highly technical, involving not only the AD/CVD laws and international law, but also complex issues of accounting and economics.

When the CIT rules on a challenge to a Commerce or ITC determination in an AD or CVD case, it either upholds the agency's determination or remands the case to the agency for action consistent with the Court's decision. It does not tell

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[2] Section 516A, Tariff Act of 1930, 19 U.S.C. § 1516a. Section 516A originally also provided for judicial review of certain interlocutory determinations by Commerce, but the Trade and Tariff Act of 1984 eliminated this review. A small category of cases involving antidumping and countervailing duty matters is reviewable under provisions other than section 516A.

[3] 19 U.S.C. § 1516a(b)(1)(B). For a few types of determinations, the standard of review is the more limited one of arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(A).

the agency what the new determination must be, or what method the agency must use to reach a new determination. For example, if the Commerce Department found a subsidy rate of 10%, the Court would not substitute its own conclusion that the rate was 5% or 15%, or that there was no subsidy at all. Instead, the Court might rule that Commerce should take certain information into account differently, or that it misinterpreted the law in making a particular accounting decision. Commerce would then redo its determination in light of the court decision.

The FTA Negotiations

The FTA negotiations took place in the wake of a U.S. countervailing duty case on Canadian softwood lumber -- a major industry historically central to Canadian development. Although the case was resolved at the end of 1986, it had occurred at a time of uncertainty in the interpretation of our CVD law, and had aroused tremendous concern in Canada over U.S. use of that law. Partly as a result of that highly publicized case, Canadians feared that the trade-liberalizing benefits of the FTA could be undercut by what they viewed as arbitrary administration of U.S. unfair trade laws. Thus a major Canadian objective in the negotiations was to devise a new bilateral approach to dealing with dumping and subsidies that could replace these unfair trade laws in the Free Trade Area.

With the advice of the private sector and many members of Congress, U.S. negotiators were unwilling to exempt Canada from our CVD law without ensuring stronger, enforceable discipline over Canadian subsidies. Just as Canada feared that the United States could use its AD/CVD laws to undercut Canadian export opportunities created by the FTA, the United States was convinced of the need to keep unfair trade laws to offset Canadian subsidies that distort trade in the FTA.

Despite intense negotiations, it proved impossible to reach agreement on subsidies discipline and new approaches to unfair trade practices in the short timeframe of the FTA negotiations. The two governments agreed instead to retain existing national AD/CVD laws and procedures. But to provide reassurance that both countries' AD/CVD laws are properly administered, the two governments also agreed that -- during the early years of the FTA, while the U.S. and Canada continue to seek subsidies discipline and better ways of handling subsidies and dumping--final decisions under the AD/CVD laws would be reviewed not by national courts, but by independent binational panels.

It is important to understand that removing review of U.S.-Canada AD/CVD cases from national courts was not the goal of either government, but instead was a means to a different end. Indeed, the FTA panel process is designed to retain as many attributes of national judicial review as possible, and in any event, court

decisions were not seen as the "problem." Rather, the two governments created the panel procedure -- combining independent review and judicial standards with an FTA-created forum and a tight schedule--as an interim mechanism that preserves private rights to relief from unfair trade practices, but allows quick resolution of bilateral AD/CVD issues while we work on improving FTA approaches to dumping and subsidies.

Similarly, the binational panel system is not, and is not intended to be, a model for future agreements between the United States and its other trading partners. Its workability stems from the similarity in the U.S. and Canadian legal systems. With that shared legal tradition as a basis, the panel procedure is simply an interim solution to a complex issue in an historic agreement with our largest trading partner.

Finally, some perspective on the magnitude of U.S.-Canada AD/CVD cases is essential. Statistics do not, of course, tell the whole story; AD/CVD cases may be important even though they do not lead to orders, and are always significant to the parties involved. But since 1980, U.S. industries have filed nearly 400 AD and over 300 CVD petitions, and of these 700-plus cases, only 31 involved Canadian products, and only 13 of those led to AD/CVD orders. (In fact, in the same period, Canada has had about twice as many AD cases (42) and orders (23) on U.S. products -- though still relatively few, and only one CVD case.) U.S. AD/CVD orders cover less than $600 million of our approximately $70 billion in imports from Canada. U.S.-Canada cases are also only a small fraction -- about 6% -- of the AD/CVD cases before the Court of International Trade, and a far smaller fraction of the total cases before the CIT.

The Binational Panel Review Process

Under article 1904 of the FTA, a panel would review, based upon the administrative record developed by the U.S. or Canadian agency involved, a final AD or CVD determination to determine whether the agency applied its law correctly to the facts of the particular case. The panel would apply the same standard of review and the same general legal principles, incorporated by reference in the FTA, as would a domestic court. For example, in a review of a Commerce final CVD determination, a panel would apply the U.S. CVD law -- including the statute, legislative history, regulations, administrative practice, and U.S. judicial precedent -- and it would judge whether the Commerce determination was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." The panel could not conduct a trial or substitute its judgment for that of the Commerce Department. Moreover, under the FTA, the panel -- much like the courts under our present system -- could either affirm the Commerce determination or remand it for a new

determination not inconsistent with the panel's decision. A panel could not issue its own AD or CVD determination.

A decision of a panel would be binding on the United States and Canada, as a matter of international law, with respect to the particular administrative determination reviewed by the panel. The FTA would not affect U.S. or Canadian cases or judicial review procedures where there is no panel review -- for example, in challenges to AD/CVD determinations involving imports from countries other than Canada.

Although the two governments are formally responsible for initiating panel review proceedings, article 1904 provides that each country shall request a panel review upon request of any person who otherwise would have standing to initiate judicial review. Thus, the FTA preserves private parties' current rights to challenge agency determinations. Parties to the case or their lawyers will argue their positions before the panel as they would before the CIT or a Canadian court. Moreover, if all parties involved in a particular AD or CVD proceeding prefer judicial review to panel review, they retain the option of initiating court proceedings instead.

The selection of able and impartial panelists will be key to the effectiveness -- and the credibility -- of the binational panel process. To ensure the integrity and efficiency of the process, the FTA establishes detailed criteria, procedures, and time limits for panel selection.

Under these procedures, the United States and Canada each will prepare, in consultation with the other, a roster of 25 individuals to serve as panelists. Candidates must be of good character, high standing and repute, and must be chosen on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law. To ensure their independence, panelists may not be affiliated with or take instructions from either government. So that judges may be eligible, however, the FTA declares judges not to be "affiliated" with either government. Panelists would generally be selected from the roster.

Individual panels will have five members, the United States and Canada each appointing two. The two governments must consult in the selection of panelists, and each country has four peremptory challenges to disqualify up to four panelists proposed by the other country. In accordance with standard rules of international dispute settlement, the fifth panelist would be chosen by agreement between the two governments, by agreement among the four panelists, or by lot from the roster. A panel is to be in place within 60 days from the date of the request for a panel.

Because the panel review process will closely resemble judicial review in the two countries, the FTA provides that a majority of the panelists on each panel (including the chairman) must be lawyers in good standing. To guard against bias or conflict of interest, panelists will be subject to a code of conduct based upon existing codes of conduct for judges and arbitrators. Violation of the code of conduct would result in removal of the panelist and the selection of a new panelist.

Decisions of a panel will be by majority vote, based upon the votes of all members of the panel. Panels will issue written decisions with reasons, along with any dissenting or concurring opinions of individual panelists.

Panels will operate under rules of procedure based on existing judicial rules of appellate procedure in the U.S. and Canada. The rules will provide all parties involved with an opportunity to be heard, and will be designed to result in decisions within 315 days of the request for a panel -- a significantly shorter time than is usually now required for AD/CVD litigation. The rules will also protect against the unlawful disclosure of the highly sensitive, business proprietary information that is typically central to AD/CVD analysis.

The two governments expect the panel system to work smoothly and effectively. As a safeguard against an impropriety or gross panel error that could threaten the integrity of the process, however, the FTA provides for an "extraordinary challenge procedure." Within a reasonable time after a panel decision is issued, the United States or Canada could trigger the procedure by alleging that: (i) a member of the panel materially violated the rules of conduct; (ii) the panel seriously departed from a fundamental rule of procedure; or (iii) the panel manifestly exceeded its powers, authority, or jurisidiction. In addition, the United States or Canada must allege that the action materially affected the panel's decision and threatens the integrity of the panel review process.

Under the FTA, the extraordinary challenge process takes place before a three-member committee selected from a roster of judges or former judges of U.S. and Canadian courts. Extraordinary challenge committees will operate under rules of procedure generally requiring a decision within 30 days. The committee can affirm or vacate the panel decision or remand the case to the original panel for action not inconsistent with the committee's decision.

Use of the extraordinary challenge process is intended to be an unusual event, not the equivalent of a routine appeal from

a lower court. Indeed, with an impartial, objective panel selection process and the other safeguards provided in the FTA, there should be little, if any, need to resort to extraordinary challenges. Nevertheless, the mere existence of this safety valve process should instill confidence in the panel system.

As this brief description indicates, the FTA's binational panel review provisions have been carefully crafted to preserve the rights of parties to U.S. AD/CVD cases to challenge agency determinations and to obtain an objective opinion as to whether the agency's determination was in accordance with U.S. law. In addition, the FTA enhances the review rights of U.S. exporters and producers involved in Canadian AD/CVD proceedings. Although Canada allows judicial review for certain types of AD/CVD determinations, U.S. exporters are currently at a disadvantage compared to the Canadian exporters involved in U.S. AD/CVD proceedings. Under current law, Canada provides no judicial review of the Canadian equivalent of a final Commerce determination that dumping or subsidization exists, and in what amount. Similarly, U.S. exporters currently have no right (in contrast to Canadian importers) to challenge assessment decisions by Canadian authorities on particular shipments during the post-order phase of an AD or CVD case. To have symmetry in the panel review system, the United States sought and obtained panel review of these determinations. The FTA thus ensures that the benefits obtained by U.S. exporters under the FTA cannot be undercut by Canada's AD/CVD laws.

Equally important is what the FTA's binational panel review does not do. First, it does not create either a new source of U.S. law or a new (and potentially divergent) interpretation of U.S. AD/CVD law in cases on Canadian products. Given the criteria for selecting panelists and the fact that panels must apply U.S. law incorporated in the FTA -- including U.S. standards of judicial review, U.S. general legal principles, and decisions of U.S. courts on AD/CVD matters -- we anticipate consistency between panel and court decisions. Moreover, under the Agreement, panel decisions are binding only with respect to the particular matter before the panel. Consequently, neither a subsequent panel nor a U.S. court reviewing an AD/CVD case on a non-Canadian product would be obliged to follow a panel decision. Of course, if a particular panel decision were well-reasoned and persuasive, a U.S. court (or a subsequent panel) could adopt the panel's reasoning and cite its decision as nonbinding precedent. But if after a panel decision, a U.S. court interpreted U.S. law differently, a subsequent panel would be bound by the court decision. Where U.S. courts have interpreted U.S. law, their interpretation controls.

The FTA binational panel process also is not intended to eliminate, or remove from U.S. courts, review of constitutional

claims. In negotiating the FTA, both governments anticipated the possibility that constitutional challenges to the legislation implementing the binational dispute settlement mechanism for AD/CVD cases would be pursued in U.S. and Canadian courts -- although neither government believes such a challenge would be successful in either country. In addition, we think domestic courts should continue to address constitutional claims that may arise in individual AD/CVD cases. Provision in the implementing legislation for such challenges must be drawn with extreme care so that frivolous or insubstantial claims of unconstitutionality are not permitted to undercut the terms of the Agreement, but we believe this can be done without imposing an impermissible burden on the exercise of constitutional rights.

In summary, we believe that the FTA binational panel review process preserves full access for U.S. industry to our AD/CVD laws and independent, quasi-judicial review of agency determinations in U.S. and Canadian AD/CVD cases, while the two governments continue to address the underlying unfair trade practices that are the true source of trade frictions between our two countries. We are confident that the panel process is constitutional, and that any concerns about it can be resolved as we work with this Committee and others in Congress to craft the implementing bill.

Senator HEFLIN. Mr. McGinnis.

Mr. MCGINNIS. Mr. Chairman, I am pleased to testify today on behalf of the Department of Justice concerning legislative language that would provide for the implementation under domestic United States law of decisions rendered by binational panels and extraordinary challenge committees pursuant to the terms of the United States-Canadian Free Trade Agreement.

As we explain below, we favor the adoption of simple language that would authorize the President to direct government agencies to implement the international obligations resulting from panel and committee decisions.

This language would ensure that panel and committee decisions were implemented in a constitutionally acceptable way without undermining the independence of the International Trade Commission.

The President would be bound to implement these decisions as a matter of international law, and we fully expect that he would do so in every case.

Before turning to the proposed legislative language, we wish to assure you that we harbor no doubts regarding the inherent constitutionality of the dispute settlement mechanism established under the terms of the FTA. We fully agree with the scholars who have written to congressional committees that, much like international tribunals that have arbitrated claims and settled boundary disputes during 200 years of American history, panel and any committee decisions would impose binding international obligations on the United States.

Possible constitutional questions arise only with regard to the means by which these binding international obligations are effectuated under the terms of domestic United States law.

We emphasize that implementing legislation that is both effective and constitutional can easily be drafted. There is no constitutional difficulty whatsoever in providing the President with authority to direct government agencies, such as the ITC and the Commerce Department, to take actions in conformance with the determinations of the binational panels.

While the United States would be absolutely bound to adhere to panel decisions as a matter of international law, however, neither the President nor government agencies may be constitutionally required to implement panel and committee decisions as a matter of domestic United States law.

Statutory language mandating that the President impose panel and committee decisions would make those decisions in and of themselves automatically binding as a matter of domestic United States law.

If such decisions were binding, they clearly would involve the exercise of "significant authority pursuant to the laws of the United States" and thus, in our view, would transform the members of panels and committees into "officers of the United States" who must be appointed in the manner prescribed by the appointments clause of the Constitution.

Buckley v. *Valeo* has indicated that the exercise of delegated authority, "judicial in nature", represents an exercise of significant authority if it is exercised under United States law.

Since the procedures for appointing panel and committee members are at variance with the appointments clause, panel and committee decisions would run the risk of being rendered unconstitutional if their decisions were automatically binding under United States law.

For these reasons, the legislative language we favor would authorize the President to direct the administering authority, the commission, and the U.S. Customs Service, as appropriate, to take necessary and appropriate action to implement our international obligations under article 1904 of the agreement pursuant to a final decision of a binational panel or extraordinary challenge committee.

This provision is simple and straightforward. It recognizes that panels and committees are international bodies whose decisions absolutely bind the United States on an international plane.

We recognize that concerns have been expressed that statutory language authorizing the President to direct ITC action, in the wake of panel or committee decisions, would somehow undermine the independence of the ITC. We believe that these concerns are misplaced.

The language we favor is not an attack on the prerogatives of the ITC, nor an attempt to assert additional Presidential control over that agency.

Since Ms. Anderson has indicated, the ITC will be able to consider the full panoply of statutory factors under the trade laws following Presidential action our statutory language would not in any way diminish any freedom of action that the ITC now enjoys in administering the anti-dumping and countervailing duty laws.

It has come to our attention that some arguments have been made against our position. For instance, it has been said that requiring the President to implement binational panel and committee decisions falls within the historical tradition of U.S. reliance on international tribunals to settle claims and boundary disputes.

This argument, while it is based on traditional practice, is misplaced. While we certainly agree that international tribunal decisions settling claims and boundary disputes have imposed obligations on the U.S. Government as a matter of international law, these decisions have not in and of themselves imposed obligations on the U.S. Government as a matter of domestic law.

Furthermore, those tribunal decisions have not directly required the President to execute specified United States laws.

I may add that it has been said the Iran claims tribunal is an example of this. I would be happy to speak to the committee on that issue. We think there are profound differences between the agreement under the Iran claims tribunal and this agreement.

We wish to emphasize that there are important practical policy reasons for choosing the constitutionally safe course here. The Justice Department surely is not alone in noting that the use of mandatory language would pose substantial constitutional problems. The adoption of such mandatory language probably would spark constitutional challenges to the FTA. In any event, before a final decision concerning the FTA's constitutionality was rendered, there would be a period of uncertainty, a period which would carry with it adverse foreign policy consequences.

Because of such uncertainty, I should add that the Justice Department does not believe it would be a sound solution to provide constitutionally alternative language within the implementing legislation.

Either of these provisions would unfortunately risk the smooth implementation of this historic agreement over a minor drafting issue that can be easily avoided. It is a drafting issue, I might add, that would as a practical matter really make no difference as a matter of the President's duty under international law to implement these panel decisions.

The President, we believe, would routinely implement these panel and committee decisions, even if merely authorized to do so. The President is well aware that a failure to do so would put us in violation of our international obligations, generate political controversy, and harm our foreign affairs interests.

Given this political reality, the use of authorizing rather than mandatory language in the FTA legislation would as a practical matter have no bearing on the matter in which Presidential authority is practically exercised.

In conclusion, there are significant constitutional reasons for authorizing but not requiring the President to implement the decisions of binational panels and committees under the FTA. The Justice Department looks forward to working with you and your staff in developing constitutionally sound implementing legislation.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions that the committee might have.

[The statement follows:]

U.S. Department of Justice
Office of Legal Counsel

Washington, D.C 20530

TESTIMONY OF

JOHN O. McGINNIS
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

BEFORE

THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

CONSTITUTIONAL IMPLEMENTATION OF BINATIONAL PANEL AND COMMITTEE DECISIONS UNDER THE U.S.-CANADA FREE TRADE AGREEMENT

MAY 20, 1988

Mr. Chairman, I am pleased to testify today on behalf of the Department of Justice concerning legislative language that would provide for the implementation under domestic United States law of decisions rendered by binational panels ("panels") and extraordinary challenge committees ("committees") pursuant to the terms of the United States-Canada Free Trade Agreement ("FTA"). As explained below, we favor the adoption of simple language that would authorize the President to direct government agencies to implement the international obligations resulting from panel and committee decisions. This language would ensure that panel and committee decisions were implemented in a constitutionally acceptable way, without undermining the independence of the International Trade Commission ("ITC"). The President would be bound to implement these decisions as a matter of international law. We fully expect that he would do so in every case.

Before turning to proposed legislative language, we wish to assure you that we harbor no doubts regarding the inherent constitutionality of the dispute settlement mechanism established under the terms of the FTA. We fully agree with the scholars who have written to congressional committees that, much like international tribunals that have arbitrated claims and settled boundary disputes during 200 years of American history, panel and any committee decisions would impose binding international

obligations on the United States. Possible constitutional questions arise only with regard to the means by which these binding international obligations are effectuated under the terms of domestic United States law.

We emphasize that implementing legislation that is both effective and constitutional can easily be drafted. There is no constitutional difficulty in providing the President with authority to direct government agencies, such as the ITC and the Commerce Department, to take actions in conformance with the determinations of the binational panels and committees. While the United States would be absolutely bound to adhere to panel decisions as a matter of international law, neither the President nor government agencies may constitutionally be required to implement panel and committee decisions as a matter of domestic United States law. Statutory language mandating that the President impose panel and committee decisions would make those decisions, in and of themselves, automatically binding as a matter of domestic United States law. If such decisions were binding, they clearly would involve the exercise of "significant authority pursuant to the laws of the United States," and, thus, would transform the members of panels and committees into "officers of the United States" who must be appointed in the manner prescribed by the appointments clause of the Constitution, article II, section 2, clause 2. Buckley v. Valeo, 424 U.S. 1, 126, 140-141 (1976) (indicating that the exercise of delegated authority "judicial in nature" represents an exercise of significant authority under United States law). Since the procedures

for appointing panel and committee members are at variance with the requirements of the appointments clause,[1] panels and committees (and, of course, the determinations they issued) would, thus, be rendered unconstitutional, if their decisions were automatically binding under United States law.

For these constitutional reasons, the legislative language we favor, which would allow panel and committee decisions to be received into domestic United States law, is as follows:

> The President is authorized to direct the administering authority, the Commission, and the U.S. customs service, as appropriate, to take necessary and appropriate action to implement the international obligations of the U.S. under Article 1904 of the Agreement pursuant to a final decision of a binational panel or extraordinary challenge committee. Any action taken under this authority shall not be subject to judicial review, and no U.S. court shall have power to review the determinations on any question of law or fact by an action in the nature of mandamus or otherwise.

This provision is simple and straightforward. It recognizes that panels and committees are international bodies whose decisions bind the United States on the international plane. Accordingly, this language gives the President authority to direct the Commerce Department and the ITC to reconsider otherwise final antidumping and countervailing determinations pursuant to final

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[1] The appointments clause requires that officers of the United States be appointed in one of two fashions. First, officers of the United States may be appointed by the President, with the advice and consent of the Senate. Second, appointment of "inferior" officers may be vested by Congress in the President alone, in the Courts of Law, or in the Heads of Departments. Half of the members of panels and committees would be appointed by the Canadian Government, a method of selection not provided for in the appointments clause.

panel or committee decisions.[2] In carrying out such reconsiderations, those two agencies may take into account the full range of statutory factors under United States law that currently may be considered in antidumping and countervailing duty determinations. Such reconsiderations, pursuant to the President's direction, are analogous to the preexisting practice under which the Commerce Department and the ITC could consider the full range of statutory factors following remands of initial agency determinations by the Court of International Trade.[3] The President's action in directing reconsiderations, as well as subsequent actions by the Commerce Department, the ITC, and the Customs Service, will not be subject to direct judicial review.[4]

[2] The President is also empowered to direct the Customs Service to revise countervailing or antidumping duties otherwise applicable to particular Canadian imports, consistent with the results of reconsiderations by the Commerce Department and the ITC.

[3] Section 1904(8) of the FTA specifies that a panel has one of two choices: it "may uphold a final determination or remand it for action not inconsistent with the panel's decision." It is clear as a matter of United States law that, when reconsidering an earlier trade law determination following a remand, the responsible agency may take into account the full range of applicable statutory factors. Indeed, "neither [the agency] nor the courts are free to abandon the statutory framework when a case is remanded." Freeport Minerals Co. v. United States, 758 F.2d 629, 636 (Fed. Cir. 1985).

[4] There is no constitutional bar to the passage of legislation precluding the judicial review of antidumping or countervailing duty tariff determinations by the Commerce Department and the ITC. Because individuals do not enjoy a vested constitutional "right to import," Congress may preclude judicial review of administrative determinations (made pursuant to a congressional delegation of foreign commerce power) establishing the conditions under which goods may enter the United States. See Butterfield v. Stranahan, 192 U.S. 470, 493 (1904). In particular, Congress may delegate to the executive authority to set tariff rates (including antidumping and countervailing duty rates) applicable to imports; tariff determinations that Congress leaves to the executive's sole discretion are not subject to judicial review. See United States v. George S. Bush & Co., Inc., 310 U.S. 371,

We recognize that concerns have been expressed that statutory language authorizing the President to direct ITC action, in the wake of panel or committee decisions, would somehow undermine the independence of the ITC. We firmly believe that those concerns are unfounded. The language we favor is not an attack on the prerogatives of the ITC, nor an attempt to assert additional presidential control over that agency. Since, as I have indicated, the ITC would be able to consider the full panoply of statutory factors under the trade laws following presidential action, our statutory language would not in any way diminish any freedom of action that the ITC now enjoys in administering the antidumping and countervailing duty laws. Presidential "direction" would simply bring panel and committee findings before the ITC, much as Court of International Trade decisions remand cases to the ITC under current law.

We are aware of two types of arguments that have been made in an attempt to assuage our constitutional concerns. Those arguments are, we submit, unconvincing.

First, it has been argued that the actions of panels and committees do not implicate the separation of powers concerns that underlie Buckley. According to this argument, since Congress and the President are "working together" to achieve the goals of the FTA, the President's constitutional prerogatives are not being unacceptably limited. This argument misreads Buckley. The key holding of Buckley is that any organ that exercises

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[4] (Cont.) 379-380 (1940). Of course, draft legislation to implement the FTA provides for judicial review of constitutional questions.

"significant authority pursuant to the laws of the United States" is subject to the appointments clause, without regard to whether such organ is "beholden" to a branch other than the executive branch, or otherwise raises "separation of powers" concerns. Moreover, the fact that Congress and the President would be "acting together" to further the United States' interests does not affect our conclusion. In Bowsher v. Synar, 106 S. Ct. 3181 (1986), for example, the Supreme Court struck down as unconstitutional a provision allowing the Comptroller General (an officer of the legislative branch) to trigger the President's exercise of discretion with regard to spending cuts, notwithstanding the fact that the President and Congress clearly were "acting together" to promote the national economic goal of spending reductions. In short, the President cannot, even in pursuit of the national interest, statutorily "bargain away" his authority under the appointments clause.

Second, it has also been said that requiring the President to implement binational panel and committee decisions falls squarely within the historical tradition of United States reliance on international tribunals to settle claims and boundary disputes. This argument, based on traditional practice, is misplaced. While international tribunals' decisions settling claims and boundary disputes certainly have imposed obligations on the United States Government as a matter of international law, those decisions have not, in and of themselves, imposed obligations on the United States Government as a matter of domestic law. Furthermore, those tribunals' decisions have not

directly required the President to execute specified United States laws. In sum, the "historic international tribunals" examples do not support the proposition that the President constitutionally can be required by statute automatically to implement panel and committee decisions.

We wish to emphasize that there are important practical policy reasons for choosing the constitutionally safe course. The Justice Department surely is not alone in noting that the use of mandatory language would pose substantial constitutional problems. The adoption of such mandatory language probably would spark constitutional challenges to the FTA. In any event, before a final decision concerning the FTA's constitutionality was rendered, there would be a period of uncertainty. Such uncertainty could carry with it adverse foreign policy consequences. Because of such uncertainty, I should add that the Justice Department does not believe it would be a sound solution to provide constitutionally alternative language within the implementing legislation. It would be unfortunate to risk the smooth implementation of this historic agreement over a minor drafting issue that can so easily be avoided.

The constitutional risks at stake are real. We would respectfully remind you that the Supreme Court recently made significant decisions in the area of executive powers, without regard to the "conventional wisdom." By way of example, many commentators believed that the legislative veto would be held constitutional. Despite these practical realities, however, the Court did not hesitate in striking down the legislative veto in

Chadha.[5] We hope that Congress will choose not to take the risk that a similar result would be reached with respect to FTA implementing legislation.

Finally, we believe that, as a practical matter, the President would routinely implement panel and committee decisions, even if merely "authorized" to do so. The President is well aware that a failure to do so would put us in violation of our international obligations, generate political controversy, and harm our foreign affairs interests. Given this political reality, the use of authorizing, rather than mandatory, language in the FTA legislation would, as a practical matter, have no bearing on the manner in which presidential authority is exercised.

In conclusion, there are significant constitutional reasons for authorizing, but not requiring, the President to implement the decisions of binational panels and committees under the FTA. The Justice Department looks forward to working with you and your staff to develop constitutionally sound implementing legislation.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions the Committee may have.

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[5] INS v. Chadha, 462 U.S. 919 (1983).

Senator HEFLIN. Senator Grassley, do you have an opening statement?

Senator GRASSLEY. Yes, Mr. Chairman. I am going to put that in the record and save my time for questions. So I will ask permission to do that.

[The statement follows:]

Chuck Grassley

STATEMENT OF SENATOR CHARLES E. GRASSLEY

HEARING ON U.S. - CANADA FREE TRADE AGREEMENT

MAY 20, 1988

THANK YOU MR. CHAIRMAN FOR HOLDING THIS HEARING ON THE U.S. - CANADA FREE TRADE AGREEMENT.

MR. CHAIRMAN, I AM AWARE THAT THIS AGREEMENT HAS TAKEN SOME TIME TO DEVELOP AND WORK OUT AND THAT THERE ARE SOME WHO FIND IT TO BE A CONTROVERSIAL AGREEMENT.

IN FACT, I WAS A MEMBER OF THE SENATE FINANCE COMMITTEE WHEN FAST TRACK AUTHORITY FOR NEGOTIATION OF THE AGREEMENT WAS CONSIDERED IN THE LAST CONGRESS. THE FAST TRACK AUTHORITY WAS VOTED OUT ON A TEN TO TEN VOTE. AT THAT TIME, I WAS AMONG THE TEN WHO VOTED IN THE NEGATIVE.

BUT I REALIZE MUCH HAS HAPPENED WITH THE AGREEMENT SINCE THAT TIME. AND MY UNDERSTANDING IS THAT THE CERTAIN PARTS OF THE AGREEMENT ARE NOT YET IN FINAL FORM. SO, I WILL LOOK FORWARD TO STUDYING THE AGREEMENT WHEN IT IS INTRODUCED IN THE SENATE.

IN THE MEANTIME, I HAVE A NUMBER OF QUESTIONS I WOULD LIKE TO POSE TO THE WITNESSES HERE TODAY. I THANK THEM FOR TAKING THE TIME TO ASSIST US IN OUR CONSIDERATION OF THE ISSUES RAISED BY THE FREE TRADE AGREEMENT.

I DO HAVE CONCERNS ABOUT THE BINATIONAL PANEL. THIS REPRESENTS A UNIQUE DEPARTURE FROM OUR SYSTEM OF JUDICIAL REVIEW. I AM A PROPONENT OF ALTERNATIVE DISPUTE RESOLUTIONS, AND HAVE INTRODUCED A BILL, S. 2274, WHICH SETS UP A FRAMEWORK FOR ALTERNATIVE DISPUTE RESOLUTION IN OUR ADMINISTRATIVE AGENCIES. BUT "ADR" IS GENERALLY A VOLUNTARY PROCESS, WITH ULTIMATE REVIEW ASSURED BY OUR COURTS.

THIS AGREEMENT PROPOSES TO ABANDON THE SAFEGUARD OF INDEPENDENT COURT REVIEW SET UP BY OUR CONSTITUTIONAL SYSTEM. SO I WANT TO GIVE IT MY CAREFUL CONSIDERATION.

AND, I ALSO HAVE A FEW QUESTIONS ON SOME OTHER SUBJECTS OF THE TREATY, SO I HOPE MR. HOMER AND MS. ANDERSON WILL BEAR WITH ME WHILE I EXPLORE THESE AREAS.

ONCE AGAIN, I THANK THE CHAIRMAN FOR THE CHANCE TO DISCUSS THIS HISTORIC AGREEMENT WITH THESE WITNESSES.

Senator HEFLIN. Mr. McGinnis, does the Department of Justice accept that the panel is standing in as a court? If not, what happens to international claims arbitration? How can those decisions have the force of law?

Mr. MCGINNIS. It is true that these panels will be standing, at least in the scheme of the FTA, rather like a court, but in our view they would not be acting under domestic law, but rather under international law and incorporating domestic law by reference.

So we think that in one way, they would be acting as a court, and in another way, of course, they would not.

Senator HEFLIN. Does the President have any flexibility in deciding whether to implement a panel decision? If he does, what happens to international claims arbitrations of all kinds? Do their decisions have the force of law?

Mr. MCGINNIS. The President, under our view, is absolutely bound under international law to implement the panel decision, and we would expect he would do so in every case.

The difficulty only arises under domestic law. That is because as I explained, under the appointments clause, those who effectuate U.S. laws and have discretion to act under them must be appointed in the proper manner.

Senator HEFLIN. Ambassador Holmer, how does the President assure the Canadians that the United States will uphold their trade agreement, if the President has the discretion in following a panel decision?

Ambassador HOLMER. We have advised the Canadians that this is an absolute, international obligation on the part of the United States, one to which this President and future Presidents will rigidly adhere.

Senator HEFLIN. Mr. McGinnis, what happens if the President does not implement a panel decision?

Mr. MCGINNIS. As I say, I think the President then would be in violation of our international obligations. And I just want to say that, given our international obligations here, and given that this binational panel decision is the linchpin of this agreement and all the manifold benefits that flow from it, there are just enormous incentives for any President to conform to our international obligations—practical incentives as well, of course, as the sense that the President always wants to honor our international obligations and to display our international comity in the world.

Senator HEFLIN. What remedies are available in the event that he fails to abide?

Mr. MCGINNIS. There would be serious consequences under the FTA if the President failed to abide by the binational panel decisions. Indeed, I believe that the Canadians could take—I would defer to Ambassador Holmer on this question—but I believe that the Canadians would take severe action against us if the President violated his obligations, and that would give him every incentive not to do so.

Ambassador HOLMER. If I could, Mr. Chairman, I would like for Mrs. Bello, our General Counsel, to amplify that some.

Mrs. BELLO. Mr. Chairman, just briefly, under the agreement there is the right for either party to terminate the agreement upon 6 months' notice in the event that they think the agreement no

longer reflects a balance of benefits to their liking, and that ultimately would be the recourse that the Government of Canada would have in the event that we failed to adhere to our international obligations.

Senator HEFLIN. Are there remedies other than termination?

Mrs. BELLO. No, sir, I don't believe so.

Ambassador HOLMER. I would underscore, though, Mr. Chairman, we think that would be purely a hypothetical situation because we do believe the President would rigidly adhere to the panel findings.

Senator HEFLIN. What would be the rights of the private parties involved?

Mr. MCGINNIS. I think the private parties do not have an opportunity for judicial review of the determinations here; they have an opportunity for judicial review only of constitutional questions. So I don't think the absence or presence of an implementation by the President would be subject to judicial review.

Senator HEFLIN. Ambassador Holmer, based on the Office of Legal Counsel's argument, how can the President enter into any international agreement when he has no obligation under domestic law to comply with the agreement?

Mrs. BELLO. Mr. Chairman, there often are the opportunities for there to be a conflict between the international obligations of the United States and the domestic law of the United States. The effort in every case is made, of course, to eliminate the tension between those that can exist so that we can under domestic implementing legislation meet our international obligations. But it would not be unusual in our view for there not to be a precise identity between the implementing bill and the international obligation. And in fact, we have a number of domestic authorities that basically provide the legal authority for the President to act inconsistently with international obligations of the United States.

Senator HEFLIN. Mr. Ambassador, how will the Canadians respond to the arguments presented today by the Office of Legal Counsel?

Ambassador HOLMER. I would suspect they would focus on the fact that the President has undertaken a very serious commitment on behalf of the United States, and the President is clearly committed as a matter of international obligation to enforce the panel findings under U.S. law.

Senator HEFLIN. Mr. McGinnis, is this mechanism that has been set up in this treaty for the termination of disputes inconsistent with article III, because the panelists would exercise judicial power without any of the protections afforded by article III of the Constitution?

Mr. MCGINNIS. No, Senator Heflin, I don't believe it is, and I believe that follows logically from the testimony that I have given, because our view is that these panels would be operating under international law rather than United States law. And of course, article III gives the Federal judiciary power over the law of the United States and not international law.

The binational panel decisions would be implementing international law, of course, by reference to our domestic laws, and so the beauty, if I may say so, of our solution to this problem is it makes it quite clear that there is no article III problem either, because

these panel decisions are binding on us as a matter of international law, and then the President is authorized to implement them as a matter of domestic law, so there is no article III problem.

Senator HEFLIN. Well, do I understand you to say that international law acts on a higher status than our Constitution?

Mr. MCGINNIS. No, I don't mean to say that at all, Senator. I just mean that there are many instances all around the world in which there are panels which we participate in—like the ICJ and other panels and multilateral arbitration boards—and these panels certainly act and may impose international obligations upon the United States, and yet I don't think it has ever been seriously maintained that they are defective because they are not article III courts.

Senator HEFLIN. I suppose you are familiar with the bankruptcy case, the *Marathon* case, which concerned the issue of non-article III judicial officers. As I recall, this involved an issue arising out of State law. Do you see any parallel that could be drawn as a result of the extension of the reasoning or the rationale in that case as it might be applicable to decisions made by panels which in effect could be determined judicial in nature and therefore requiring an article III judge.

Mr. MCGINNIS. I don't think so, Senator. As I recall, the issue in *Marathon* was essentially the issue of whether Congress in the course of a bankruptcy proceeding could permit State common law claims to be adjudicated by a non-article III tribunal. And it was said that, of course, State common law claims could be adjudicated only by an article III court, because article III adjudication was essential to the kind of dignity that State common law claims enjoy under our constitutional system.

I think here, we are in a completely different area in which there is a distinction between State common law claims in any event and public right claims, which tariff determinations are. I think that is one distinction. And more fundamentally, I think nothing about *Marathon* implies that international law claims have to be adjudicated in article III courts when they are binding on the United States only as a matter of international law, because there is a rich history of our being bound as a matter of international law without recourse to article III courts.

Senator HEFLIN. Is there an issue concerning judicial review in setting up the binational panel?

Mr. MCGINNIS. I don't believe so, Senator. I'd like to make clear that the authorizing legislation does permit limited judicial review for constitutional matters, for arguing that the implementing legislation itself is unconstitutional or is being applied in some way that deprives American citizens of their constitutional rights.

But as to judicial review simply of the amount of tariff determinations, I think it is well settled that such review is not required under the Constitution. There are a series of cases that begin at about the turn of the century—I would refer you to *Butterfield* v. *Stranahan,* 192 U.S. 470; 493 (1904) that makes it clear that no individual has a vested right to trade with foreign nations, and the right is not of a character to prevent Congress and the President from depriving a citizen of that right without judicial review. And

this case was followed up on in *United States* v. *George Bush and Co.*, 310 U.S. 371 (1940).

I should say that these specific decisions appear consistent with the general line the Supreme Court has drawn where judicial review in article III courts is essentially required for constitutional questions, for actions of common law, but not for issues of public right.

Senator HEFLIN. Is there any problem with the binational panel procedure relative to the due process provisions that are contained in the amendments to the Constitution, as it would apply to an individual taking his property without due process of law?

Mr. MCGINNIS. I don't think so, Senator, because again I think this is an issue of tariff determinations, and I think that the due process issue, insofar as you said that the implementing legislation were being applied in a way that violated due process, you would have an action. But insofar as you said that you were objecting to the tariffs insofar as you were objecting simply that they were set too low or too high, I think it is quite clear that there is no right to judicial review; there just is no due process right to having them set at any particular level.

Senator HEFLIN. What about the equal protection clause of the Constitution? Do you feel that there is any problem with meeting constitutional muster relative to the binational panel procedure?

Mr. MCGINNIS. No. I think there are two points to be made about that. First, the binational panel decisions will be made under international law and not our own law. But secondly, and I think crucially, in tariff determinations, there is no right to a particular determination. On the other hand, as you will recall, the ITC decisions that finally emerge will be able to be challenged if they are applied in an unconstitutional manner that would in some way discriminate against the rights of American citizens. Accordingly, there would be an opportunity if an ITC decision came out that in any way deprived people of due process of law, then the courts would be open to hear it. I can't, however, imagine that kind of claim being readily made.

Senator HEFLIN. Senator Grassley?

Senator GRASSLEY. Thank you, Mr. Chairman.

I believe my questions might be more appropriate for Mr. Holmer, but if you want to respond in any way, Mr. McGinnis, feel free to do it.

Let me begin by asking if we are not making a fundamental change in the way we resolve disputes in the U.S. with the creation of this binational panel. The risk, as I see it, is that parties dissatisfied with the binational panel will run to Congress to change the decision reached by the panel. We are moving away from judicial review which has the respect and confidence of the parties to a dispute. When a court makes a decision, the parties aren't always running to Congress to change it.

It would seem to me like with the courts not being involved, it is going to just end up in the political branch as a final determinant.

Ambassador HOLMER. Mr. Grassley, let me respond, and then I'd like to ask Ms. Anderson to amplify what I have to say.

We hope and expect that that won't be the case at all, because you have a situation where this binational panel, we believe, will

come to be perceived as being an objective, impartial body that will make determinations the way courts presently make those determinations at the Court of International Trade.

It should be emphasized that the binational panel will be administering U.S. law—this is with respect to cases filed by U.S. petitioners involving Canadian exports to the United States—they will be applying the U.S. antidumping and countervailing duty law as written by the Congress, including the statute, the legislative history, the regulations of the Commerce Department and the administrative practice and prior court decisions.

The process at the Commerce Department and at the International Trade Commission will work just as it has before. The only question happens if you want to appeal that decision, where do you appeal that to, and it will now go to this binational panel.

In many respects, we think this process may have some significant benefits for U.S. industry in the sense that currently, if you are talking about Canadian cases—and there are more Canadian cases that have been filed against U.S. exports than there are U.S. cases that have been filed against Canadian exports—currently, if the Canadians were able to bring a countervailing duty case against our corn exports, which they did, and we want to have a chance to take them to court, currently there is no opportunity for that court to be able to review the dumping or the subsidies decision.

That will be changed, and those decisions now will be subject to review through this panel, and we also expect that that process will be able to work far more expeditiously than is currently the case in U.S. courts.

So we think there are substantial benefits, and we would anticipate that U.S. industries and Canadian industries will find this will be a very effective surrogate for the judicial review.

But I'd like to give Jean Anderson an opportunity to amplify that.

Ms. ANDERSON. I would just add one or two brief points. If somebody who is a party to a proceeding before the panel is dissatisfied with the panel decision—and of course, people are often dissatisfied with court decisions, too, but in this case, let's assume they are dissatisfied with the panel decision—if they have a real concern, a real reason for concern, not just that they disagree or they wish the result had been different, but there was something about the panel process that wasn't as it should have been—for example, the panel really had ignored U.S. law on the point; a panelist had decided he liked his own theory of the law instead of what the Court of Appeals for the Federal Circuit had said our law means; or the panel hadn't accorded the party the proper procedural rights required under panel procedures—if anything like that happened, we would expect that party to the proceeding to come to us and say this panel decision was undermined by the panel not doing what it was charged with doing under the FTA, and we would seek an extraordinary challenge committee, which would be a committee made up of three judges or former judges from the United States and Canada whose task would be to look to see whether the panel process was tainted by a failure to follow the mandate that has been given.

So there is an appeal, if you will, not an appeal of right, but an appeal from a panel process that has gone awry. We honestly don't think that those extraordinary challenges will probably ever be invoked, certainly not often. But we think the existence of this extraordinary appeal procedure makes it quite certain that the panel process itself is going to be a very careful court-like process, with panelists acting very much like judges.

Senator GRASSLEY. Well, let's hope that your hope for this to be well-respected and well-received is a fact, but even if you are correct, that is going to be slow in coming. That isn't something that is going to happen right away. You build respect as this new panel will, and I don't expect you to speak any differently than you have, because that's the way you feel about it.

But I think you are going to have a period of time here where maybe things are going to be thrown to Congress, and probably we aren't very well-equipped to resolve the issues, where I think maybe the courts are a little more respected.

Ambassador HOLMER. Senator Grassley, my hope is that as we draft the implementing legislation and as we draft the statement of administrative action, we can address some of the issues you have raised with sufficient specificity so that the concerns that you or other members of the Senate or the House have with respect to this process can be assuaged.

Senator GRASSLEY. Was this binational panel set up as a political compromise to get the treaty? Did the Canadians insist upon it?

Ambassador HOLMER. What the Canadians wanted was to have an exemption from our countervailing duty law and our antidumping law, or at least to have a rewrite of those laws. We said no, that that just wasn't going to happen, and was going to cause very grave problems, we thought, in the Congress if we were to agree to that.

Senator GRASSLEY. And it would have.

Ambassador HOLMER. Well, I think we sensed right, Senator Grassley. But yes, it was worked out. We think there are a number of benefits that accrue to the United States as a result of this binational panel process, as well as to Canada.

Senator GRASSLEY. Well, did you have to change some of your views on this, because didn't you write in a fall 1987 article that our courts are honest and open-minded in applying countervailing duties and that judicial review is a good check on the executive branch's administering of the law?

In other words, you were speaking highly of our judicial review, and legitimately so.

Ambassador HOLMER. Yes.

Senator GRASSLEY. And by the way, I am not leading up to putting you into a box, so don't get nervous. But you spoke so highly of how the courts were in this process and the finality of it.

Ambassador HOLMER. The thrust of what I was saying there was that one of the reasons why you have had 700 cases filed under the dumping and countervailing duty law since 1980 is because U.S. industries have confidence in those laws and in the process, and one of the reasons that they have that confidence is because of the lack of political discretion that exists with respect to those laws.

Part of that is a result of judicial review. But what has been established here is a binational panel process that will serve as a surrogate for that judicial review, and I don't believe that would in any way diminish the thrust of the comments that I made in 1987 in terms of the effectiveness of those laws.

Senator GRASSLEY. Is this a totally unprecedented approach that we have ever used in the 200-year history of international arrangements, this binational panel? Is there any precedent for it at all?

Ambassador HOLMER. There are several precedents for that. I don't know if Ms. Anderson has those at the tip of her fingers or not. If she doesn't——

Senator GRASSLEY. Well, you don't need to read them all.

Ambassador HOLMER. No. There are several precedents for that.

Senator GRASSLEY. Then, this leads me to this point, then. You visualize this binational panel following some of these precedents that you can show me here, right—procedurally, I am talking about.

Ambassador HOLMER. The earliest example of a dispute resolution panel having binding authority on international law was the Jay Treaty of 1794, between the United States and Great Britain. A more recent example is the International Joint Commission pursuant to the Boundarywaters Treaty of 1909 between the United States and Great Britain.

Senator GRASSLEY. Then you visualize this binational panel working along the lines of some of these precedents; is that what you are telling us?

Ambassador HOLMER. I'd like for Ms. Anderson from the Commerce Department, who negotiated this part of the agreement, to respond to that specific question as to exactly how it will work.

Jean?

Ms. ANDERSON. Senator Grassley, I wish I could say that this follow clearly in the footprints of previous precedents. Unfortunately—I think life would be easier if it did—there are some unique aspects to this binational panel.

Senator GRASSLEY. Okay. Then tell me it was not in any way meant to follow that precedent, and I'll be satisfied.

Ms. ANDERSON. It is meant to follow in the same tradition as many of those binational and multinational dispute resolution systems have been. This is unique in some respects, notably that the binational panel will be reviewing decisions of administrative agencies of the two Federal Governments, and that has usually not been the primary purpose of binational panels in the past.

Senator GRASSLEY. That's all I have, Mr. Chairman.

Senator HEFLIN. Thank you. We will submit some questions in writing, and we would appreciate your prompt response by the close of business on Monday. We have very limited time. The written questions will be submitted today, and we would like to request that the responses be submitted by close of business Monday.

Senator GRASSLEY. May I ask one final question and then I'll submit some for written response, too.

Senator HEFLIN. Go ahead.

Senator GRASSLEY. It was reported in the news this week that the Canadian government cannot convince the Province of Ontario to comply with the Free Trade Agreement between the United States

and Canada, and also the province of Prince Edward Island is evidently on record opposing the agreement. And as I understand, Canadian law gives the provinces quite a bit of autonomy in this area.

Can you shed any light on this dispute and explain what effect this may have on finalizing the agreement?

Ambassador HOLMER. We are looking into that issue, Senator Grassley. All I can say is that the Canadian government has committed that the terms of this agreement will be implemented at the Federal level and at the provincial level, just as we have committed on behalf of the United States that this agreement will be implemented at the Federal level and at the State level. And we fully expect that Prime Minister Mulrooney and his government will do everything necessary to ensure that there is full compliance at both the Federal level and the provincial level.

Senator HEFLIN. How can you assure the Canadians that there will be implementation at the State level?

Ambassador HOLMER. In the legislation that has been approved by the Finance Committee thus far, there is a provision there that states that if there is an inconsistent State law, that the Free Trade Agreement would control—to the extent of any inconsistency.

Senator HEFLIN. I am informed that Senator DeConcini has questions concerning the constitutionality of the binational panel. He is unable to be here today but will submit questions in writing.

The time frame on this is so short that it is going to be necessary that we receive the answers back on all written questions by the close of business on Monday.

Ambassador HOLMER. If we could take them back with us right now to the extent you have them, that would be very helpful. We want to do everything we can to comply with that, Mr. Chairman.

Senator HEFLIN. All right.

Senator GRASSLEY. And I'll submit my questions to you yet today.

Senator HEFLIN. Thank you.

Senator HEFLIN. The next panel is Harold Bruff, visiting professor of law at American University, and Professor Andreas Lowenfeld, of New York University.

Come forward, please, and we will be delighted to hear from you now.

Professor Bruff?

STATEMENT OF A PANEL INCLUDING HAROLD BRUFF, VISITING PROFESSOR OF LAW, AMERICAN UNIVERSITY, AND ANDREAS LOWENFELD, PROFESSOR OF LAW, NEW YORK UNIVERSITY

Professor BRUFF. Thank you, Mr. Chairman.

I am Harold Bruff, of the University of Texas, visiting this spring at American University.

If I may, I would like to offer my written statement for the record and direct my oral statements.

Senator HEFLIN. It will be entered, and we appreciate your summarizing.

Professor BRUFF. I would like to direct my oral statements to responding to some positions the Department of Justice has taken

before you today. Of course, I stand ready to answer your questions as I can on every aspect of the constitutional issues.

I would like to state fundamental disagreement with the position of the Department of Justice taken before you today. The Department apparently feels that it is necessary to have the binational panel decisions endorsed by the President of the United States before they may be transmitted to the American administrative agencies.

The Department's position is that this is compelled by *Buckley* v. *Valeo,* in an effort to protect Presidential prerogative under article II.

I believe, however, that the effect of doing that would be fundamentally to destroy rather than to protect the powers of the President and of the United States Government as a whole in entering international obligations. Let me explain.

The core position that the Department of Justice provides you is on page 3 of Mr. McGinnis' statement. It says: "Once a binational panel decision has occurred, the President may direct the administering authority as appropriate to take action."

The language is capable of more than one reading. There are two primary candidate readings. Under one of them, the President would be able to receive a binational panel decision, exercise his discretion on whether it should be accepted by the United States, and if he thought so, transmit it, and if he thought not, refuse to do so. That would be to give the President substantive discretion to review the binational panel.

The competing reading would place the President in an essentially ministerial position. He would receive the decisions of the panels, would stamp them with the seal of the President of the United States, and by that act, without exercising any discretion of his, would protect them under article II.

I think either reading is essentially inconsistent with separation of powers as we have seen it throughout our history. That is because the Free Trade Agreement is a common example of what we have had since the beginnings of our Republic—an international agreement that provides mechanisms to settle international claims. In its essentials, it does so in a way that is very traditional. That is, it takes matters of international controversy—dumping, countervailing duty decisions—in the process of regularizing trade relationships with Canada, it takes those out of existing review provisions and would send them to international arbitration.

A great number of prior agreements that we have entered in this country have done something more or less like that—taken matters of contention and sent them to international arbitration, such as international claims and international boundary agreements.

For the President to have the power to enter such an agreement, he has to be able to make a promise that sticks.

Now, under the first reading of the Department of Justice draft, the President's position on a particular panel decision would be this: I will endorse and pass along any binational panel decision with which I agree. I therefore promise to the Canadians that international arbitration will be binding whenever we like it.

That, it seems to me, is not an acceptable position for any international partner to an international agreement.

Now, let me be clear that the President, just like Congress, retains the ability under the Free Trade Agreement to terminate the agreement as a whole in accordance with the kinds of international practice that Mr. Lowenfeld can give you more detail on—for example, the President could terminate this one; Congress could pass a later statute inconsistent with it and terminate it.

But the President ought not to be required to retain some sort of case-by-case power to inspect these decisions in a way that is fundamentally at odds with the idea of arbitration, which is that it is to be one, international and two, neutral.

To take the other reading just for a moment, if the President is not to exercise any power, but is merely to stamp the decisions and send them along, I think that trivializes the great purpose of *Buckley* v. *Valeo*. *Buckley* was intended, I believe, to protect the President's power of supervision over executive agencies by protecting his appointments power in a case where Congress tried to strip it away from him. I think the decision was fundamentally correct.

This, however, is a subject matter far-removed from that. And I think the problem with the Justice Department position is that they are reading *Buckley* woodenly, far from its orbit of purpose, and in a way that undermines Presidential power.

Thank you.

[The statement follows:]

Statement Before the Committee on the Judiciary
U. S. Senate
May 20, 1988

Harold H. Bruff
John S. Redditt Professor of Law
The University of Texas at Austin

I am pleased to present my views on the constitutionality of certain provisions of the proposed Canada-United States Free Trade Agreement (FTA). Under existing law, antidumping and countervailing duty determinations are made through the interaction of the International Trade Administration (ITA) of the Department of Commerce and the International Trade Commission (ITC). Judicial review may then be had in a sequence of Article III courts: the Court of International Trade, the Court of Appeals for the Federal Circuit, and the possibility of Supreme Court review. The FTA would create an international arbitral tribunal to perform these review functions. I conclude that these provisions of the FTA are within the constitutional powers of the United States government, pursuant to its authority to enter international agreements.

Although displacing other features of the domestic law of the signatory nations, the FTA would temporarily retain in force their bodies of statutory and administrative law that impose duties to offset international price discrimination (dumping) and subsidization of exports (countervailing duties). Under Article 1904, each Party nation is partially to replace judicial review of final administrative determinations with binational panel

review. Either Party may request a panel review of any final antidumping or countervailing duty determination of the administrative agencies, and they must do so if a private person otherwise qualified to invoke judicial review so requests. If no request is made, however, ordinary domestic judicial review is available.

The panels are constructed in a manner common to international arbitration (Annex 1901.2). The Parties jointly develop a roster composed of their citizens, a majority of whom are to be lawyers. Each Party appoints two members of a panel from the roster, and the fifth is selected by a series of procedures designed to maximize mutual assent. A panel then holds an appellate hearing and applies the legal standard of review that a domestic court would employ. Both the administrative agencies and private persons having standing under domestic law may appear and argue. The panel is empowered to uphold the agency, or to remand its order for action "not inconsistent with the panel's decision" (Art. 1904.8). The FTA makes the panel's decision final, except for an "extraordinary challenge procedure" before another specially constituted panel. There, parties could raise the very limited grounds for review that typify arbitral schemes, for example a member's conflict of interest or a claim that the panel "manifestly exceeded its powers" (Art. 1904.13).

A frame of reference for analysis of this scheme is provided by some general principles about the nature and effect of

international agreements, the nature of tariff determinations, and the extent of congressional power to assign the judicial power created by Article III to courts, executive officers, and arbitrators. I first review these principles, and then turn to a series of discrete constitutional objections that may be raised against the FTA.

The proposed FTA is not a treaty, but rather a species of international agreement called a "Congressional-Executive agreement." Legislation authorized executive negotiations leading to formulation of the FTA; legislation will implement it. If completed, the agreement will modify domestic law, as would a treaty.[1] Nevertheless, it seems to be firmly established that no international agreement is "free from the restraints of the Constitution," such as those in the Bill of Rights.[2] In sum, international compacts can alter our law, but not our system of separated powers or our constitutionally protected liberties.

Tariff controversies are as old as the Republic. Pursuant to its powers to lay duties and to regulate foreign commerce, Congress has granted the executive widely varying degrees of discretion to set particular tariffs. The constitutionality of broad delegations to the executive has long been settled in this area, in part due to the presence of the President's own foreign

1. L. Henkin, Foreign Affairs and the Constitution, Ch. 6 (1972).

2. Reid v. Covert, 354 U.S. 1, 16 (1957)(declining to find authority for courts-martial of military dependents overseas in an executive agreement).

policy powers.[3] Under statutes that create especially broad executive discretion, the Supreme Court has found particular determinations to be unreviewable in court at the behest of affected private parties,[4] or has declined to read statutory requirements for administrative hearings to entitle private parties to full adjudicative process.[5]

Thus, in at least some circumstances Congress is free completely to exclude private parties from participating in tariff determinations.[6] Indeed, that is the effect when Congress sets tariffs directly by legislation (except, of course, for whatever lobbying Congress tolerates). Similarly, Congress may allow the executive to set tariffs without engaging in prior administrative process invoked by affected parties, and without subsequent judicial review. These statements require qualification, however, by two kinds of due process principles. First, even where Congress is free to withhold statutory entitlements to particular government benefits, if it does confer

3. See, e.g., J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); see generally P. Shane & H. Bruff, The Law of Presidential Power 65-66 (1988).

4. United States v. George S. Bush & Co., Inc., 310 U.S. 371 (1940).

5. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933).

6. "No one has a legal right to the maintenance of an existing rate or duty." Norwegian Nitrogen Products, 288 U.S. at 318 (Cardozo, J.). Since judicial review of both antidumping and countervailing duty determinations is performed by suits against the United States, a simple technique to withdraw existing review rights would be to restore sovereign immunity. See generally Lynch v. United States, 292 U.S. 571 (1934).

entitlements, due process requires procedure appropriate to the context.[7] Second, due process may forbid statutory preclusion of judicial review in at least some situations where review is functionally appropriate.[8]

The possibility of due process limits to congressional control of federal court jurisdiction is an exception to an otherwise broad congressional power to allocate the judicial power created by Article III. Adjudicative matters falling within the federal question jurisdiction have been assigned to a wide variety of deciders other than the Article III judiciary, with the approval of the Supreme Court.[9] The list includes state courts, "legislative courts," executive officers, and private arbitrators. I discuss the limits of this congressional power below. At least it is clear that no inflexible principle requires all federal adjudication to be performed by federal judges.

The foregoing analysis might lead to the conclusion that there can be no successful assault on the FTA's displacement of existing judicial review provisions. The argument is of a familiar variety: "the greater power includes the lesser." That

7. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564 (1972).

8. See generally Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981).

9. See generally Young, Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell To Schor, 35 Buffalo L. Rev. 765 (1987).

is, if an international agreement or a domestic statute could set duties without private participation, and if there is no inherent right to review of tariff determinations by Article III courts, then what forecloses the lesser step of retaining review and assigning it to international arbitration? It is possible that our courts will take just such a simplistic approach to the issues, and if so the FTA is safe. But the modern doctrine of unconstitutional conditions emphasizes the need to find justifications for the actual choices made by Congress in qualifying benefits that it is free to deny entirely.[10] The doctrine is applied somewhat inconsistently, but it rests on the sound premise that unthinking resort to arguments that the "greater power includes the lesser" could lead to deep intrusions on constitutional liberties in our modern welfare state.[11]

Accordingly, the better approach is to examine the particular provisions of the FTA and their justifications to see whether they pass constitutional scrutiny under prevailing doctrine. I focus on three possible objections, based on due process rights of affected private parties, Article III limits on the judicial power, and Article II limits on the assignment of executive responsibilities to private persons.

10. See generally Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984).

11. See, e.g., United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947) (observing that Congress could not deny federal employment on grounds such as race or religion).

Due process constraints apply to government programs that entitle persons meeting statutory criteria to certain benefits, such as lower import duties. Recent statutory tariff regimes have increasingly relied on private parties to police executive discretion, by granting them access to both administrative hearings and judicial review.[12] Frequently, antidumping and countervailing duty proceedings are pressed by American producers, who complain that foreign competitors are selling below fair value here, or are being subsidized. On the other side are American importers, who have contracted for the goods and on whom the duties will fall. For purposes of analysis, I will assume that current statutes confer entitlements concerning imposition of the duties, although that is a tricky question of substantive law. Thus, producers would have a statutory right to be free of prohibited kinds of foreign competition; importers would have a right to be free of duty if the statutory preconditions for its imposition are absent.

The Supreme Court decides what process is due by applying a test that considers the weight of the private and governmental interests involved, and the accuracy of the procedure provided.[13] The leading due process case involving arbitration in federal programs is Schweiker v. McClure,[14] in which the Court

12. Ehrenhaft, The "Judicialization" of Trade Law, 56 Notre Dame Law. 595 (1981).

13. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

14. 456 U.S. 188 (1982).

unanimously upheld the decision of disputed Medicare claims by private insurance carriers, without a right of appeal. Focusing on the accuracy of the process, the Court stressed regulatory requirements that deciders be qualified by background and training to deal with issues arising in the program. A companion case, United States v. Erika, Inc.,[15] held that the statute did not authorize judicial review of particular arbitral awards.[16]

Now let us apply the Court's test to the FTA. The private interest in correctly assessed duties is likely to be substantial, whether an importer complains about an assessment or a producer seeks one. I assume that no one asserts the inadequacy of the first stage for determining duties, administrative process before the agencies. When no party seeks arbitral review of an administrative decision, for example when the preexisting judicial review scheme is invoked, private interests will be fully satisfied. Also, parties who consent to arbitral review cannot be heard to complain.[17] Therefore, any

15. 456 U.S. 201 (1982).

16. The Court did not reach issues concerning any constitutional right to review. 456 U.S. at 211 n.14. A subsequent case held that the preclusion did not extend to statutory issues concerning the overall method by which claims are computed, as opposed to particular applications of the general criteria. Bowen v. Michigan Academy of Family Physicians, 106 S.Ct. 2133 (1986).

17. The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), requires courts to enforce agreements to arbitrate disputes that otherwise could find their way to federal court. The Court's recent FAA cases strictly enforce such agreements. See, e.g., Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987). Although one might doubt whether consent to an arbitration clause in a commercial contract is always meaningful (see the dissent in McMahon), there should be no need for concern for a party who selects the arbitral forum when judicial review

threat to the interest in accuracy would occur when arbitral review is requested by one of the Party nations, perhaps at the behest of a private firm. At that point, the private and public interests collide.

The government's interest flows directly from the international context of antidumping and countervailing duty disputes. They necessarily involve mixed issues of fact and international trade policy about events outside our borders. Examples include determinations whether certain aspects of a nation's tax laws constitute a subsidy to industry, or whether a manufacturer's domestic price structure reflects a protected environment. Thus, each duty dispute has implications for international trade relations. Indeed, privately initiated duty disputes have proven their capacity to affect and embarrass trade negotiations between Canada and the United States.[18] Perceived needs to create an international forum to review the disputes have become an important feature of the FTA as a whole. Here, government interests of a high order arise. I think American courts would hold that the national interest in smoothing international trade relations subordinates private interests in particular domestic judicial review procedures.

Due process would still require, however, that the

remains available, as it would be under the FTA.

18. See Koh, The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement, 12 Yale J. Int'l L. 193, 213-15, 222-23 (1987).

replacement procedure be acceptably accurate. In McClure, the Court engaged in a practical inquiry into the appropriateness of the arbitral process provided for the issues presented. The FTA should pass such an examination. Its arbitral mechanism resembles those used in private international arbitration, which enjoys wide acceptability today. The Court has repeatedly approved the use of private international arbitration to resolve statutory issues of similar complexity to those involved in duty disputes.[19] These cases do involve contractual consent to arbitration, which, if meaningful, is an independent justification for the process. Nevertheless, the Court has stressed its belief that international arbitrators can competently resolve complex legal issues arising under American statutes.[20] Moreover, the FTA's appellate-style arbitral review differs from ordinary arbitration by furnishing the review panel a fully developed administrative record. The question whether the agency decision meets normal administrative law criteria for legal sufficiency should be familiar to Canadian and American lawyers. I find no reason to doubt the overall accuracy of the FTA's process.

The Supreme Court has balked, however, at the use of

19. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (trademark and securities).

20. See also Devine v. White, 697 F.2d 421, 438-39 (D.C.Cir. 1983) (Edwards, J.) (arbitrators are competent to interpret statutes in a domestic context).

arbitration to resolve constitutional[21] or civil liberties issues.[22] Similarly, it has refused to interpret restrictions on judicial review to foreclose consideration of constitutional issues.[23] In general, the Court seems disposed to honor restrictions on "retail" judicial review of particular claims, but not "wholesale" review of the constitutionality or statutory fidelity of an administrative program.[24] The FTA can be interpreted to preserve judicial review of constitutional issues about the operation of arbitral review, or otherwise arising in administration of the duty programs. To assure compliance with due process, Congress should not alter the FTA in that respect. Also, important statutory issues about overall operation of the program would sometimes arise. Arbitration, which usually does not generate decisions having precedential effect, could resolve them for purposes of the case at hand. Precedent governing both courts and arbitrators would then be set by those cases remaining in the judicial review system. With these understandings, I think the FTA would pass due process scrutiny.

Antidumping and countervailing duty cases arise under federal statutes. Therefore, they fall within the judicial power of the United States that Article III creates, and could be

21. McDonald v. City of West Branch, 104 S.Ct. 1799 (1984).

22. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (arbitration does not preclude suit under Title VII).

23. E.g., Johnson v. Robison, 415 U.S. 361 (1974); see also note 16 supra.

24. See Bowen, distinguishing Erika on that ground.

assigned, in the first instance or on review, to the federal courts. The question whether Congress must grant particular portions of the judicial power to the federal courts is the subject of a particularly difficult and opaque body of caselaw.[25] There are at least two reasons for the difficulties. First, congressional power to define federal court jurisdiction is universally considered to be broad-- the problem is one of articulating limits. Second, much of what the executive branch does is functionally adjudicative in nature, for example making the fact determinations on which a duty dispute turns. Therefore, to characterize a function as adjudicative in nature only begins, and does not end, the inquiry.

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,[26] a badly divided Court invalidated the assignment of state-law claims to federal bankruptcy judges who lacked Article III status. A plurality opinion thought that these private-law matters fell within mandatory federal court jurisdiction, but recognized an exception for "public rights" cases, which the plurality defined as claims against government that Congress could commit entirely to executive discretion. Here, again we see a "greater power includes the lesser" argument-- if claims against government may be barred entirely by sovereign immunity, they may also be assigned to administrative determination. The

25. See generally Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 916 (1988).

26. 458 U.S. 50 (1982).

public rights doctrine has a long, unhappy history of use by the Court to label, rather than to explain, conclusions about judicial power.[27] Nevertheless, duty disputes would fall within the formulation used in Northern Pipeline, and may therefore be assigned to nonjudicial determination.

Subsequent cases have provided some further guidance. In Thomas v. Union Carbide Agricultural Products Co.,[28] the Court upheld a mandatory arbitration provision of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Arbitration is used to determine compensation that one manufacturer must pay another for the administrative use of product data submitted by the other that is useful for the registration of both manufacturers' products. The Court emphasized the nexus between the use of arbitration and effective administration of the administrative program. It characterized those wishing to register and market pesticides as consenting to arbitration, and noted the availability of limited judicial review of arbitral awards.

Thomas provides some direct support for the use of arbitration in federal programs. Nevertheless, because the contexts in which government arbitration occurs are very

27. See generally Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197. The doctrine originated in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (upholding a summary procedure for the government to recoup its moneys from its customs collectors).

28. 473 U.S. 568 (1985).

diverse,[29] we should be careful in generalizing. After Thomas, it is important that the FTA presents a clear nexus between an adjudicative determination and governmental powers that flow from Articles I and II, not just Article III. Less persuasively, the rather strained view of consent found in Thomas could be extended to the FTA, for an argument that those importing goods consent to the arbitral process provided. This argument, however, seems too fictional to deserve weight. On the other hand, one could argue that Thomas conditions the permissibility of arbitration on the availability of subsequent judicial review, which is lacking in the FTA. Here, it bears emphasis that FIFRA authorized only the very limited review for corruption and facial invalidity that typifies judicial review of arbitration. The FTA also authorizes such review, in a body apparently competent to give it, although not a court. Accordingly, I think that Thomas provides significant, but not conclusive, support for the FTA.

The Court has since provided some more generalized guidance to the mandatory contours of Article III. In Commodity Futures Trading Com'n v. Schor,[30] the Court upheld the authority of an agency to consider state-law counterclaims in an administrative adjudication. The Court called for consideration of the nature of the rights to be adjudicated, the congressional purposes

29. See generally Bruff, The Constitutionality of Arbitration in Federal Programs, in Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution 961 (1987).

30. 106 S.Ct. 3245 (1986).

behind a particular scheme, and the extent of inroads on the "essential attributes of judicial power." Under this formulation, I think the FTA is clearly constitutional. The reasons lie in the purposes and nature of international agreements, and their service to national needs. For if the FTA's replacement of judicial review occurred in a purely domestic scheme, I do not think it would survive. Northern Pipeline contains many mysteries, but at bottom it seems hostile to the creation of adjudicators who mimic closely the more generalized functions of federal judges, but who lack Article III status. Accordingly, the replacement of routine judicial review of administrative action with arbitration that is to make precisely the same determinations, as the FTA does, would be fatal in an ordinary statute.

Confirmation of the relevance of the international dimension is provided by Dames & Moore v. Regan,[31] in which the Court upheld the executive agreements that ended the Iranian hostage crisis, including an executive order suspending claims against Iran that were pending in federal courts and transferring them to an international arbitral tribunal.[32] The Court relied in part on the practice, dating from the birth of the Republic, of

31. 453 U.S. 654 (1981).

32. The Court did hold, though, that claims that the suspension and referral constituted a taking of property in contravention of due process could be presented to the Court of Claims when ripe. Thus the Court continued its practice of finding ways to preserve opportunities to present constitutional claims to the federal courts.

settling international claims of American citizens through international agreements.[33] As Dames & Moore illustrates, international trade has direct bearing on relations between nations. And as the history of the FTA confirms, this is as true when claims involve private business relationships as when they involve direct contacts with a foreign government. Therefore, I do not consider it dispositive that the settled Iranian claims were against the Iranian government. That fact does invite "greater power includes the lesser" arguments based in sovereign immunity, but it ignores the underlying source of national power, which is the need to be able to rearrange and stabilize trade relationships.

Granting adjudicative power to an international body, whose decisions become binding domestically through the operation of the supremacy clause, is no intrusion on an essential function of the federal judiciary. Indeed, what is essential in crafting international agreements is the power to make arbitral bodies truly international in composition. Hence they are creatures of the foreign policy powers to be found in Articles I and II of the Constitution, not Article III.

This analysis also suggests why it is not necessary that members of an international arbitral panel be "Officers of the United States," appointed in accordance with article II. True,

33. See generally L. Henkin, supra; R. Lillich, International Claims: Their Adjudication by National Commissions 6-15 (1962). Our first use of the technique was in the Jay Treaty of 1794, restoring amicable trading relations with Great Britain.

Buckley v. Valeo[34] held that anyone "exercising significant authority pursuant to the laws of the United States" must be appointed in conformity with the appointments clause. But the case arose in a domestic context, and forbade Congress to appoint members of the Federal Election Commission, which exercises ordinary executive powers. Attempts by Congress to aggrandize itself at the expense of the executive present fundamentally different problems from attempts to authorize or require the delegation outside the government of some functions that could be performed by the executive.[35] Ever since the founding generation entered the Jay Treaty, our practice has been to create international arbitral bodies whose members are not executive officers. Buckley should not be read to condemn this history, or to require formal appointment of the arbitrators to federal office. Since a central function of the appointments clause is to allow executive supervision of officers, such appointments would either be inconsistent with the arbitral role, or would needlessly trivialize the appointments clause.

Another reason for Buckley's inapplicability to international arbitration is that any international agreement calling for it must be negotiated by the executive, even if, as with the FTA, there is congressional authorization and implementation. Executive assent to the technique selected must be real, or no agreement eventuates. Of course, we would not

34. 424 U.S. 1 (1976).

35. See Schor, 106 S.Ct. at 3261.

find power in a branch of government to bargain away all its domestic prerogatives. For an international agreement, however, it makes sense to view claims settlement procedures as incident to the broader power to determine the nation's trade policy with regard to a coequal such as Canada.

Senator HEFLIN. Professor Lowenfeld.

Professor LOWENFELD. Thank you, Mr. Chairman.

You have just heard from Mr. Bruff, who is an expert in administrative and constitutional law. My own experience is that of one who has written and taught for many years in the field of international law and international trade law. I have also had a good deal of experience as an international arbitrator. I am serving right now, for example, as a member of a panel in the GATT in the trade dispute between the United States and the European Community.

So, rather than reading my whole statement, I thought I'd just skip around a little bit and perhaps respond to some of your questions.

I would like to say at the outset that I agree completely with what Professor Bruff said, and I was astonished at the position presented to you a few minutes ago by the Justice Department. The notion that an international agreement of the United States adopted by the Congress is not law is to me astonishing. I believe that if such a view were accepted I would really have to re-do everything that I have taught and worked for and so on for many years.

Turning to the Agreement, my overall conclusion is there is no constitutional impediment to adoption through the legislative process of the Canada-United States Free Trade Agreement and in particular chapter 19. I think some of the aspects of the agreement are unique. The question Senator Grassley put—does it have precedent—yes and no. But overall, I think it fits within the traditions of the foreign relations law of the United States, both with respect to dispute settlement and with respect to legislation concerning international trade.

I think you don't need—I'll put it in the record—but you don't need me to go through the particular aspects of the way chapter 19 works, except that I would like to make one point that perhaps isn't sufficiently clear.

Dispute settlement under the agreement is not likely to be United States on one side, Canada on the other, and a panel deciding which of the two countries is right. It is quite possible that you will have both countries on one side, and a particular litigant from either country on the other. For example, roughly half—I don't have the precise statistics—but roughly half of antidumping and countervailing duty proceedings end up with negative determinations, either on the question of dumping or subsidy or on the question of injury; and then, let's say the domestic manufacturer would have a right to review and instead of appealing to the court, he would have the right to review before the panel. Well, presumably, the U.S. Government would defend the decisions of its agencies. We can't be absolutely sure if Commerce and USTR might think the Commission was wrong, but what I'm trying to say is it is not choosing up sides, and that is why, for example, the question of who was the fifth member of the panel doesn't matter very much.

What is going on here is a five-member panel which acts in lieu of the Court of International Trade; it decides factual questions on the basis of whether there is substantial evidence in the record and legal determinations on the basis of its construction of the law, the legislative history, precedents, and so on.

It is interesting that if a determination cannot fit within an international obligation—for example, the General Agreement on Tariffs and Trade or the antidumping code—then the Trade Agreements Act says that the statute shall be given effect. And the panel, in the antidumping and countervailing duty context, would do so as well. It would be different if the panel were acting under 1903, in sort of an advisory opinion context, where it does construe a proposed amendment in light of the international agreement, the FTA itself, and the antidumping/countervailing duty codes and the GATT.

So that is the basic framework of the Agreement. It seems to me it is a unique and imaginative institution. I think if the U.S. Constitution required that all determinations concerning the entry of merchandise required scrutiny by courts of the United States created pursuant to article III, the FTA would be in violation of the Constitution. I don't believe there is such a requirement. In my statement, I go through a whole series of not only judicial decisions, but legislative developments, demonstrating that we have gradually moved from a large amount of executive discretion to more and more judicialization; that has both advantages and disadvantages.

But in general, I think Congress has felt recently that the executive branch wasn't sufficiently sensitive to the needs of domestic competitors, and also that bureaucrats were making essentially legal decisions that ought to be subject to judicial review and scrutiny. So gradually, more and more of the trade law is subject to judicial review—still, not all of it. Perhaps the most important trade law that we have is the import relief law, the escape clause under section 201, and there is no judicial review of determinations by the International Trade Commission under that section. You may remember perhaps the most important trade case that we have ever had, the automobile case, Certain Motor Vehicles Case, in 1980, brought by Ford and the United Auto Workers, and raising quite a close question.

The International Trade Commission decided three-to-two that, although there was injury and there were increased imports, the increased imports weren't the principal cause of the injury and therefore denied relief.[1]

I am not sure whether that decision was right or wrong. I discussed that in my book over a number of pages.[2] But my point is there was no judicial review. I don't think there is a constitutional requirement for judicial review. That isn't to say that you don't need due process. You do need due process for any kind of review. You need due process among administrators: We no longer live in a society where an official, whether he is a commissioner or he is an Assistant Secretary of Commerce, can simply make a decision without a record, but we think we get that.

I have no doubt whatever that the panel set up pursuant to article 1904 and the annex, will give due process. It will decide on the

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[1] *Certain Motor Vehicles and Certain Chassis and Bodies Therefor,* Report to the President on Investigation TA-201-44 under Section 204 of the Trade Act of 1974, USITC Publ. 1110, Dec. 1980, 45 Fed. Reg. 85194 (Dec. 28, 1980).

[2] A. Lowenfeld, *Public Controls on International Trade,* 383-99 (2d ed. 1983).

record. Interested parties will be represented, and the decision will be in writing and justified.

So I think you asked earlier whether there is a due process issue. My answer is a little different from the Justice Department. I say yes, there has to be due process. Dispute settlement under the agreement is not exempt from the Due Process Clause, but the panel procedure provided gives every indication that there will be due process.

Now, we have heard something here about raising a potential constitutional question. My view is that the attempts in the draft of the implementing legislation that I have seen to provide an elaborate mechanism for challenging constitutionality and then putting in disincentives, such as sanctions, payment by a successful party of prevailing party's legal fees and so on, is really making more of the issue than there ought to be. I don't think that the courts have any trouble deciding real constitutional questions; you don't have to make special provisions for such challenges. But there is no reason to invite that kind of action where there is no obvious issue.

I wanted to call to your attention, Senator, and perhaps you remember, a case called *Johnson,* the *Administrator of Veteran Affairs,* v. *Robison,*[3] in the U.S. Supreme Court, decided in 1974. It was a case about the Veterans Administration, and the statute said the veterans benefit law will be administered by the Veterans Administration, and there shall be no judicial review; Veterans Administration decisions will be fine. It was administrative review within the administration, but that's all.

Well, along came a fellow who said, "I was a conscientious objector. I did 2 years' alternative service in a hospital rather than going to the Armed Forces, and I am entitled to the educational benefits provided by the G.I. Bill, and if I don't get those, that's a denial of equal protection and also a denial of my first amendment rights of freedom of religion."

He went to court, Massachusetts Federal District Court, and the government said no judicial review, because that's what the statute said.

He said, "Well, I'm not concerned with the Veterans Administration construing the statute. I say there is a basic constitutional claim." And of course, both the lower court and then the Supreme Court said that's right, that's right. Where you had a legitimate constitutional question, we'll give you a right to raise that question.

So I don't think Congress has to provide elaborate procedures. I would have thought that if you have, let's say, the first fellow who comes along who but for the FTA could have gone to the Court of International Trade, and is forced to go to the panel, if he says, well, I'm going to go to the Court of International Trade anyway, and the government will move to dismiss, and probably the motion will be granted; he then appeals, and eventually perhaps he gets to the Supreme Court, maybe even without going through the Court of Appeals. That is what happened in *Dames & Moore* concerning

[3] 415 U.S. 361(1974).

the Iran Claims Tribunal.[4] It went immediately from the district court to the Supreme Court, and when the issue came on the table, the Supreme Court took it on an accelerated basis without any particular implementing legislation, and decided that the Hostage Agreement was constitutional, the process was fine—end of issue.

I think that's the way this ought to be done and not a whole lot of elaborate procedures for contingencies of various kinds.

Let me just conclude by summarizing, Senator. I think chapter 19 constitutes a resourceful solution to a difficult problem—how to fit national procedures concerning unfair trade practices within an overall scheme that would eliminate barriers to trade between the two countries.

Since eliminating all unfair trade remedies in trade between Canada and the United States was not politically acceptable, as Ambassador Holmer just said, and harmonizing the criteria beyond the framework provided by the GATT and MTN Codes proved too difficult within the time—they had a fast track procedure, too, as you know—within the time allotted to the negotiations, I think the compromise of bilateral review of unilateral decisions was both creative and fair.

I think one can look forward to gradual harmonization of the perceptions and practices of the two nations as the body of precedent builds up in the decisions of the binational panels.

I would hope, in fact, that U.S. courts in cases not covered by the panel would—and I think the legislation ought to say "should"—look at the recent opinions of the panels.

I think no basic rights of any party, American or Canadian, importer, exporter, or domestic competitor, would be jeopardized by the proposal for review by binational panels.

I think if the Canada-U.S. Free Trade Agreement is acceptable on other grounds—and I have no doubt that it is—there is no legal or constitutional impediment to acceptance of the dispute settlement provisions of the agreement and no need to create additional judicial mechanisms to test this proposition.

Thank you, Mr. Chairman.

[The statement follows:]

[4] *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

Hearing on Dispute Settlement Provisions of
U.S.-Canada Free Trade Agreement
May 20, 1988

Outline of Statement

Andreas F. Lowenfeld
New York University

The Dispute Settlement provisions of the proposed Canada-United States Free Trade Agreement are an imaginative and resourceful way to cope with a difficult problem -- how to preserve each country's measures of protection against unfair trade, particularly antidumping and subsidies -- within the framework of an Agreement providing for elimination of all barriers of trade between the two countries.

I believe the Agreement provides for impartial professional review of administrative decisions, in a manner that comports with due process. Further, I believe that no constitutional rights would be violated by the procedures contemplated in the Agreement, and that there is no impediment under the U.S. Constitution to adoption of the agreement and passage of implementing legislation by the Congress.

Experience with other panels of this kind -- notably GATT Panels, international arbitration, and the U.S.-Canada Joint Commission -- lead to the realistic expectation that the procedure for reviewing administrative determinations rendered in connection with antidumping and countervailing duty cases will be fair and reasonable, and that over time the business community in both countries will be able to rely on the precedents established by the Panels.

If the rest of the Agreement is satisfactory, I would urge its approval by the Judiciary Committee and by the Congress as a whole, on the basis that the dispute settlement provisions do not derogate from the Agreement, but in fact enhance its value, by providing a fair and uniform method for settlement of trade disputes.

STATEMENT OF

PROFESSOR ANDREAS F. LOWENFELD

BEFORE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

UNITED STATES-CANADA FREE TRADE AGREEMENT

BINATIONAL DISPUTE SETTLEMENT MECHANISM

May 20, 1988

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

May 20, 1988

United States-Canada Free Trade Agreement

Andreas F. Lowenfeld

New York University
School of Law

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before your Committee to share with you my views on the dispute settlement aspects of the proposed United States-Canada Free Trade Agreement. I am honored by your invitation, and I want to emphasize that I appear solely for myself, not on behalf of any client, group, or interest.

The focus today is on the constitutionality of Articles 1901-1911 of the proposed Canada-United States Free Trade Agreement, which provide for review by a binational commission of decisions by departments or agencies of each party in certain unfair trade cases. I have had the opportunity to read some of the comments on this question from persons with expertise in United States constitutional law, federal jurisdiction, customs law and practice, and administrative law. My own perspective is primarily that of someone who has written about and taught in the field of international trade law for many years. I have also had occasion to address the constitutional aspects of participation by the United States in the international economy, both as a

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member of the Office of Legal Adviser in the U.S. Department of State (1961-66), and more recently as an Associate Reporter for the Restatement (Third) of the Foreign Relations Law of the United States.

My overall conclusion is that there is no constitutional impediment to adoption through the legislative process of the Canada-United States Free Trade Agreement, and in particular Chapter Nineteen thereof. I believe that decisions of the Department of Commerce or the U.S. International Trade Commission in antidumping and countervailing duty cases need not be subject to judicial review by a United States court established under Article III of the Constitution; I believe that the use of a binational panel to review decisions of the Department of Commerce or the International Trade Commission does not violate the Appointments Clause, Article II, §2, cl. 2 of the Constitution; I believe that the use of a binational panel in the circumstances provided does not represent an unconstitutional delegation of legislative power; and I believe that the Agreement does not contravene constitutional principles of separation of powers. While some aspects of the Agreement are unique, I believe that overall it fits within the traditions of the foreign relations law of the United States, both with respect to disputes settlement and with respect to legislation concerning international trade.

I. Chapter Nineteen of the Agreement

Chapter Nineteen of the Agreement, entitled "Binational Panel Dispute Settlement in Antidumping and Countervailing Duty Cases," is not easy to understand, and it may be useful to set out my understanding of the principal provisions.

1. Effect on Internal Law

The Agreement requires no change in either party's internal law (other than in regard to judicial review) concerning imports of goods alleged to be dumped or to be beneficiaries of subsidies.[1] (Article 1902). While each country is a party to the International Anti-Dumping Code[2] and the Agreement on Subsidies and Countervailing Duties,[3] both negotiated in the Tokyo Round of Multilateral Trade Negotiations (MTN), the law and practice of the two countries differ in detail. Evidently the effort to harmonize the laws of the two states was abandoned or postponed in the course of negotiating the Free Trade Agreement (see Articles 1906-07), in favor of the unique procedural provisions contained in Chapter Nineteen of the Agreement.

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[1] Canada: Special Import Measures Act, Stat. Can. 1984, c. 25; United States: Tariff Act of 1930 as amended, §§701-707; 731-740; 751; 771-778; 19 U.S.C. §§1671-1671f; 1673-1673i; 1675, 1677-1677g.

[2] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 31 U.S.T. 4919; TIAS 9650 (1979).

[3] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, 31 U.S.T. 513, T.I.A.S. 9619 (1979)

2. Effect on Existing Procedures

The assumption underlying the Agreement is that each country will maintain its existing procedures for administering its antidumping and countervailing duty laws, which for both countries are divided between an agency of the executive branch and an independent regulatory agency. However, for imports from one country to the other subjected to antidumping or countervailing duty proceedings, any legal challenge to final determinations of these bodies (Department of Commerce and the U.S. International Trade Commission for the United States, Revenue Canada (technically the Deputy Minister of National Revenue for Customs and Excise) and the Canadian Import Tribunal for Canada) is to be addressed not to the respective country's courts, but to an ad hoc panel of five independent persons selected from a previously created roster of 50 persons familiar with international trade law. Article 1904. (See Annex 1901.2 for the procedures for selecting members of the panel).

3. Effect on Changes in Existing Law

While each country reserves the right to amend its antidumping or countervailing duty law, if an amendment would apply to goods from the other country, the country contemplating the amendment must give advance notification to the other country and on request must consult with the other country prior to enactment of the amending statute. If the other country maintains that the proposed amendment would be inconsistent with

prior decisions of a panel convened under the Agreement, or that the amendment would contravene the GATT, the Anti-Dumping Code, the Subsidies Code, or the object and purposes of the Free Trade Agreement, it would be open to that country under the Agreement to seek a declaratory opinion from a panel created as described above. The procedure for a declaratory opinion would not necessarily hold up passage or entry into effect of the amending statute in question, but if the panel concluded that the amendment was not in conformity with the Agreement, further consultations would be required, and if corrective legislation were not enacted within a year from the issuance of the panel's declaratory opinion, the other country would be entitled to take comparable legislative or executive action or even to terminate the Agreement. Article 1903.

4. Access to Binational Review

Resort to the panel procedure under either Article 1903 (proposed legislation) or Article 1904 (antidumping or countervailing duty determination) is to be on the initiative of a Party, i.e., the government of the United States or the government of Canada; however, Article 1904(5) provides that on request of a person who under the laws of the importing country would be entitled to seek judicial review of a final antidumping or countervailing duty determination,[4] the Party shall request review by the panel. If the government requested to seek review

[4] See for the United States: Tariff Act of 1930 as amended §516A, 19 U.S.C. §1516a; for Canada Special Import Measures Act, s.62.

chooses not to do so -- for example if the U.S. government chooses not to seek review of a determination by the Department of Commerce that a given import is not subsidized[5] -- it would be required to notify the government of the other Party of the private party's request for review, and that government -- in the example the government of Canada -- could then request review by the panel. (Article 1904(15)(g)(ii)). If neither government requested review by the panel, it would be open to the private complainant -- for example a United States manufacturer of a like product -- to seek review from the competent domestic court, in the United States the Court of International Trade.[6] Not every permutation under this procedure can be foreseen at this writing. The Agreement clearly provides, however, that in any proceeding under Article 1904, private parties -- whether they be importers, domestic producers or intervenors -- shall have the right to appear and be represented by counsel before the panel. Article 1904(7). It is conceivable that a private party might be arrayed

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[5] I should add my understanding that this would not be merely a self-judging exercise. The determination of no subsidy would have been made by the International Trade Administration in the Department of Commerce, approved ordinarily by an Assistant Secretary or a Deputy Assistant Secretary; the request for review by the Panel would be the responsibility of the United States Trade Representative.

[6] There is perhaps an anomaly between the requirement that a [government] party shall request review by a panel on request of a private interested person, and the provision for review on request of the other party if the first party does not do so. The explanation, consistent with the overall preference for panel review rather than review in the courts of either country, seems to be that if either party regards a case as important enough to be submitted to a Panel, such review cannot be thwarted by the other party and the private petitioner.

on one side of a dispute and the two governments on the other. The panel would nevertheless have to render a decision under the law, i.e., the law of the importing party.

5. Review by the Panel

The standard for review by the panels has two aspects. For binding determinations under Article 1904, in review of final determinations of dumping, subsidy, and/or injury by administrative bodies of one party, the standard of review is to be the same as that of the corresponding domestic court -- for the United States the U.S. Court of International Trade. As to factual determinations that means an inquiry into whether the decision is supported by "substantial evidence on the record," §516A(b)(1)(B) of the Tariff Act of 1930 as amended, 19 U.S.C. §1516a(b)(1)(B). As to legal determinations, the panel would be required, as a reviewing authority, to put the interpretation of the body whose decision was challenged alongside its own interpretation of the applicable statute of the importing country -- for the United States the relevant provisions of the Tariff Act of 1930, the Trade Act of 1974, and the Trade Agreements Act of 1979, as amended (plus any relevant subsequently passed legislation). The panel's interpretation would be guided by construction of the statute, legislative history, judicial and administrative precedents, and one supposes precedents established in prior decisions of other panels established pursuant to the Agreement. But while, in general, a statute of the United States is to be construed, if fairly possible, so as

not to bring it into conflict with international law or international agreement of the United States, Restatement (Third) of Foreign Relations Law, §114, (1987), Murray v. Schooner Charming Betsy, 6 U.S.(2 Cranch) 64 (1804), the Panel would be required to observe §3(a) of the Trade Agreements Act of 1979, 19 U.S.C. §2505(a), which states that

> No provision of any trade agreement approved by the Congress under [the section authorizing approval of the MTN agreements, including the Anti-Dumping Code and the Subsidies Code], nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.[7]

Thus, for instance, suppose the United States International Trade Commission had found imports of a subsidized product of Canada to be the cause of "material injury," in that the harm from the imports in question was "not inconsequential, immaterial, or unimportant." Trade Agreements Act of 1979 §771(7)(A), 19 U.S.C. §1677(7)(A). An aggrieved importer, in addition to contesting the factual determination, might contend that the quoted words are inconsistent with Article 2(1) note 6 of the Subsidies Code, which states that

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic injury, ... and shall be interpreted in accordance with the provisions of Article 6.

Article 6(2), in turn, speaks of "significant increase in subsidized imports," and "significant price undercutting by the subsidized imports." (emphases added). It is clear that in such

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[7] There is no comparable provision in Canadian law.

a case the panel, like the U.S. Court of International Trade and the Court of Appeals for the Federal Circuit, would be required to use the United States statutory standard, even if -- and I take no position here on this point -- that were a lower standard than the standard of the Code.

In contrast, if the panel were requested under Article 1903 to give a declaratory opinion on a proposed amendment to domestic legislation applicable to imports from Canada, -- say an amendment to §§701(a)(2) and 771(7)(A), 19 U.S.C. §1671(a)(2) and 1677(7)(A), that would remove the requirement of materiality altogether in defining "injury", the panel would be required to give its opinion on whether such an amendment conformed with the Subsidies Code or the GATT itself (compare GATT Article VI(6).

II. Judicial Review of Trade Determinations

If the United States Constitution required that all determinations concerning the entry of merchandise into the United States required scrutiny by courts of the United States created pursuant to Article III of the Constitution, Chapter Nineteen of the proposed Free Trade Agreement would violate the Constitution.[8] I believe there is no such requirement, and

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[8] I see no reason to try, as some of the comments to your Committee have done, to pretend that the binational panels to be established under Chapter Nineteen are courts of the United States. They are not courts, and they are by definition and purpose international organs, not organs of either state. As is spelled out in part IV below, however, the fact that the panels are not Article III courts is not proof -- indeed is no evidence whatever -- that they lack the ability to accord due process of law to persons before them.

though in many situations Congress has recently provided judicial review of administrative actions concerning international trade, there are several situations even today when Congress has seen fit not to require judicial review.

As long ago as 1845, the Supreme Court, over Justice Story's dissent, upheld a statute that in effect denied to importers the right to challenge in court an import duty alleged to be illegally exacted. Cary v. Curtis, 44 U.S.(3 How.) 236 (1845). To deny Congress the power to limit the jurisdiction of courts in suits against the United States, Justice Daniel wrote for the Court, "would be to elevate the judicial power over the legislative branch of the government, and to give to the former powers limited by its own discretion merely." 44 U.S. at 245.

Under section 316 of the Fordney-McComber Tariff Act of 1922, 42 Stat. 858, 943, the Tariff Commission (forerunner of the United States International Trade Commission) was authorized to make findings and recommendations to the President concerning unfair methods of competition and unfair acts in connection with importation and sale of articles produced abroad. As under present §337, 19 U.S.C. §1337, section 316 provided that the Commission was to make findings and to submit recommendations to the President which might lead to additional duties, or in some circumstances to exclusion of the article in question.[9] Appeal from the findings of the Commission could be taken to the Court

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[9] See also the procedures under the escape clause, Trade Act of 1974, §§201-03, 19 U.S.C. §§2251-53.

of Customs Appeals. In Ex Parte Bakelite Corporation, 279 U.S. 438 (1929), the importer did appeal, and the successful petitioner before the Commission challenged the jurisdiction of the Court of Customs Appeals, on the ground that the Commissions's findings and recommendations were subject to action by the President, and thus did not meet the requirement of "case or controversy." The Supreme Court upheld the jurisdiction of the Court of Customs Appeals, holding that that court was not an Article III court and thus the "case or controversy" requirement of Article did not apply to it. In the course of its opinion, the Court spoke of Congress' power to lay and collect duties on imports "and to adopt any appropriate means of carrying that power into execution." 279 U.S. at 458. Appeals from decisions of the Customs Court, formerly the Board of General Appraisers, "include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." ibid.

It may be that today there are certain types of actions, even those affecting certain so-called "public rights," as to which the Constitution mandates the opportunity for a hearing before an Article III court. See Crowell v. Benson, 285 U.S. 22 (1932) citing, for example, a claim of citizenship by one ordered deported as an undesirable alien. Compare Ng Fung Ho v. White, 259 U.S. 276 (1922). I do not believe that assessment (or non-assessment) of a countervailing or antidumping duty is such a

matter. While the Supreme Court has not, so far as I know, ruled on the question, the decisions of the lower federal courts, as well as the legislative developments with regard to judicial supervision over imposition of import duties over many decades, support this conclusion.[10]

Under the countervailing duty statute enacted in 1897, expanded in 1922 to encompass production as well as export subsidies, and reenacted as §303 of the Tariff Act of 1930, 19 U.S. §1303, a domestic producer could bring a potential countervailing duty case to the attention of the Treasury, and both the domestic producer and the importer could make informal submissions to the Treasury, orally or in writing. If a countervailing duty was imposed, the importer could challenge the duty in the Customs Court, with appeals from the decision of that court (probably an Article I court) to the Court of Customs Appeals (also an Article I court), and by certiorari to the U.S. Supreme Court.[11] Two cases of this kind did in fact reach the Supreme Court, Downs v. United States 187 U.S. 496 (1903), G.S. Nicholas v. United States, 249 U.S. 34 (1919). But if the Secretary of the Treasury declined to impose a countervailing

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[10] I am not suggesting that a party to a countervailing duty or antidumping proceeding is not entitled to due process. As spelled out in part IV below, however, I believe it is a mistake -- albeit a common one -- to equate due process with the right to review before an Article III court.

[11] See, generally, Feller, "Mutiny Against the Bounty: An Examination of Subsides, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law," 1 Law & Pol'y in Int'l Bus. 17, 28-32 (1969).

duty, there was substantial doubt that judicial review was available. The technical reason was that the statute permitting review of American manufacturers' protests referred to valuation, classification, and to the rate of duty applicable;[12] determination whether a given measure undertaken by a foreign government was or was not a "bounty or grant" did not seem to fit within these categories. Beyond this, there seems to have been a feeling that judging another country's economic and fiscal measures was a delicate matter involving foreign policy, the possibility of retaliation, and other considerations not suitable for placing on the record for decision by courts. In 1971, the Court of Customs and Patent Appeals, in a 3-2 decision reversing the Customs Court, apparently resolved the doubts against review of a negative decision by the Secretary. United States v. Hammond Lead Products, Inc., 440 F.2d 1024 (C.C.P.A. 1971), cert. denied, 404 U.S. 1009 (1971):

> [T]he true Congressional intent... we believe contemplates some moderate degree of executive discretion in defining what sort of foreign governmental actions constitute indirect bounties or grants. An alleged indirect bounty or grant reasonably not seen as such by the executive is a case outside the contemplation of Congress [when it adopted §516(b) concerning jurisdiction to hear domestic manufacturers protests]. 440 F.2d at 1031.[13]

In the Trade Act of 1974, Congress changed the result of the

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[12] See Tariff Act of 1930 §516, 19 U.S.C. §1516 (1930-75).

[13] The dissenting judges disagreed on construction of the statute, regarding imposition of a countervailing duty as a matter of classification and/or rate of duty. Id. at 1033-35. The dissenters raised no constitutional point.

Hammond Lead case by statute. In amended §516, Congress provided that the Secretary must, on request by an American petitioner (manufacturer, producer, or wholesaler) publish his decision that an antidumping or countervailing duty not be assessed, and provided that the petitioner could commence an action in the Customs Court contesting that determination. The reasons for the amendment were to some extent political -- the perception in Congress that the executive branch had not been sufficiently sensitive to the needs of American competitors for protection against unfair practices by other countries or foreign producers, and to some extent legal -- the feeling that bureaucrats were making mixed legal and factual decisions that should be subject to public and judicial scrutiny. I have reviewed the hearings and reports on the amendment to §516 as contained in §331(b) of the Trade Act of 1974, and I can find no indication that any member of Congress, or any witness -- governmental or private-- regarded the amendment as required by the Constitution.[14]

Thus after passage of the Trade Act of 1974, both affirmative and negative determinations by the executive branch (then Treasury) in antidumping and countervailing duty

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[14] The amendment was not included in the House version of what became the Trade Act of 1974, H.R. 10710. For a brief exchange with Secretary of the Treasury Shultz on the subject, see The Trade Reform Act of 1973, Pt. I, Hearings before Sen. Comm. on Finance, 93d Cong., 2d Sess. p. 98 (1974). The amendment is described in the Senate Report on the Trade Reform Act of 1974, S. Rept. No.93-1298 93d Cong. 2d Sess. p.178 (1974). The paragraph, entitled "Equal Judicial Review Rights for Domestic Producers," refers to the uncertainty of existing law on the point, but makes no reference to a constitutional right.

determinations were subject to judicial review, not only by persons against whom a duty had been assessed but by unsuccessful petitioners (i.e., domestic producers) for imposition of a countervailing or antidumping duty. However, before an antidumping duty could be assessed, a finding of injury was required by the (renamed) U.S. International Trade Commission, Antidumping Act of 1921, as amended, §201(a), 19 U.S.C. §160(a) (1921-79), and it was not clear whether negative injury determinations of the Commission were subject to judicial review.[15]

In the Trade Agreements Act of 1979, as emphasis on injury to domestic industries became sharper and the injury requirement was extended to countervailing duty cases involving imports from countries party to the Subsidies Code (as well as other "Agreement States"), determinations by the Commission concerning injury in countervailing and antidumping cases were expressly made subject to judicial review, whether the determination was affirmative or negative, on initiative of any interested party that had participated in the administrative proceeding. §516A(a)(1) and (2) of the Tariff Act of 1930, as adopted by §1001 of the Trade Agreements Act of 1979, 19 U.S.C. §1516a(a)(1)

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[15] See SCM Corp. v. United States International Trade Commission, 404 F.Supp. 124 (D.D.C.), reversed and remanded 549 F.2d 812 (D.C. Cir. 1977); SCM Corp. v. United States, 450 F. Supp. 1178 (Cust. Ct. 1978).

and (2).[16] Again the principal motive was to reduce the perceived political element in the process of defending against "unfair" foreign trade practices, not, so far as appears, securing to parties to trade disputes a constitutional right that was being denied to them.[17]

As of 1988, it appears that all antidumping and countervailing duty decisions are subject to at least limited judicial review in a specialized court, the (renamed) Court of International Trade, with review by the U.S. Court of Appeals for the Federal Circuit. However, negative injury determinations by the International Trade Commission in escape clause proceedings, 19 U.S.C. §§2251-53, such as the immensely significant negative determination in 1980 concerning the automobile industry, Certain Motor Vehicles and Certain Chassis and Bodies Therefor, USITC Publ. 1110, 45 Fed. Reg. 85194 (1980), are not subject to judicial review at all. Since escape clause actions are at least as important in protecting the interests of American manufacturers and workers as are antidumping and countervailing duty cases, the absence of judicial review of negative determinations by the Commission confirms the conclusion that

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[16] Numerous interlocutory determinations by the administering authority (Department of Commerce) and the Commission were also made subject to judicial review. These determinations are excluded from the panel procedure provided by the Agreement. See Article 1904(10).

[17] See Report of House Comm. on Ways and Means on Trade Agreements Act of 1979, H.R. Rept. No. 96-317, 96th Cong. 1st Sess. pp. 179-84 (1979); Report of Sen. Finance Committee on Trade Agreements Act of 1979, S. Rept. No.96-249, 96th Cong. 1st Sess. pp. 27-28, 244-253 (1979).

access to judicial review is not perceived either in Congress or in the courts as a constitutionally required right.[18]

The subject is a technical one, and the history is not unequivocal. The conclusion that emerges, however, is that access to judicial review of determinations of administrative bodies -- whether in the executive branch or by independent commissions -- has increased over the years, but has not generally been seen as a constitutional right, nor necessarily committed to Article III courts of the United States. As of 1988, as shown above, judicial review of most, but not all, administrative determinations in connection with imports has been provided for by Congress in specialized Article III courts.[19] Neither judicial review itself, nor commitment of such review to a particular class of courts, appears to be mandated by the Constitution. If Congress chooses, whether in implementation of an international agreement or otherwise, to alter once again the opportunity for review of certain import relief decisions, the Constitution does not seem to me to preclude such action.

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[18] Escape clause actions between the United States and Canada are covered in detail in Chapter Eleven of the Agreement, with resort in case of disagreement to arbitration under Chapter Eighteen. I do not here deal with the arbitration provisions of Article 1806-1807, except to point out that while the panel procedures are similar, there is no requirement that the arbitration follow the standards of judicial review or apply the law of the importing country.

[19] See 28 U.S.C. §1585, adopted in 1980, and providing that the Court of International Trade shall possess all the powers of a district court of the United States.

III. The Character of the Panels

The suggestion appears to have been made, that somehow the binational panels to be established in accordance with Chapter Nineteen of the Agreement would be "officers of the United States" and hence would have to be appointed according to Article II, §2, cl. 2 of the Constitution, or would be exercising "legislative powers" in violation of Article I, Section 1 of the Constitution. With all respect, I believe these suggestions reflect a misunderstanding of the character of the binational panels, and suggest a far greater departure from international practice in which the United States has engaged since the founding of the Republic than is justified. The panels have many analogues, past and present, from international claims tribunals, to GATT dispute settlement panels, to the United States-Canada Joint Commission, and even the International Court of Justice. It has never been suggested, so far as I am aware, that any of these bodies exercises the legislative or judicial power of the United States, though of course their decisions and awards may have legal consequences in and for the United States, or that the members of these bodies, whether United States citizens or not, were somehow "officers of the United States."

1. The Panels and the Appointments Clause

The appointments clause, rarely an issue in United States constitutional history, came to public attention recently because of the decision of the Supreme Court in Buckley v. Valeo, 424 U.S. 1, 109-143 (1976), involving the Federal Election

Commission, some of whose members were selected by the President, others by the President pro tempore of the Senate and the Speaker of the House of Representatives. The Court held that the adjudicatory and enforcement functions assigned to the Commission were functions of "Officers of the United States," and thus could not be assigned to persons appointed by means other than those contemplated in the Appointments Clause. Though the binational panels to be created pursuant to the Free Trade Agreement have adjudicatory functions, I do not believe that they would be exercising the judicial power of the United States, and I do not believe that it is consistent with the concept of international dispute settlement to regard either the panels themselves or their U.S. citizen members as Officers of the United States. It seems to me that the panels themselves are international bodies which have United States citizens as members, just as do the United Nations Secretariat, the International Court of Justice, the International Monetary Fund and World Bank, and a great number of other international organs. In some instances Congress has made explicit provision for appointment of U.S. representatives to these bodies.[20] In other instances, persons serving on international organs on behalf of the United States are named by the President or his delegees pursuant to the foreign affairs power of the President; and in still other

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[20] See, e.g., Bretton Woods Agreement Act §3, 22 U.S.C. §286a, providing for appointment of U.S. executive directors of the IMF and the World Bank, though they receive no salary or other compensation from the United States.

instances, such as the dispute settlement panels created under the GATT,[21] the individuals are designated by the organizations themselves. But whatever the particular mode of selection, the persons serving in these capacities do not receive salaries from the United States, earn retirement benefits from the United States, act on behalf of the United States, or otherwise have the characteristics of officers of the United States.

2. The Panels and the Legislative Power

The question of legislative powers appears to relate only to the provision for declaratory opinions of a panel under Article 1903. Under this article, as described above, either party could seek the opinion of a panel on the compatibility of proposed or actual amendments to the other country's antidumping or countervailing duty law with the Free Trade Agreement, with the GATT, or with the International Anti-Dumping or Subsidies Codes. I do not understand this function as in any sense exercising the legislative (or judicial) power of the United States. A declaratory opinion under Article 1903 does not purport to affect the legislation in question, except in terms of advice or recommendation. Nothing the panel could say would change the law of the United States, whether the opinion was issued before or after passage of the amendment.

It is, of course, possible that the panel might suggest a way to interpret an ambiguous provision of law in a way to avoid or resolve an ambiguity. Also, a declaratory opinion under

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[21] See note 23 infra.

Article 1903 on a controversial proposal might be influential in debates in Congress (as well as in the Canadian Parliament). But surely influencing debates or interpreting statutes is not exercise of the legislative power. If it were, no executive branch officer could testify before a committee of Congress, no judge could interpret a statute, and no constituency or lobby could attempt to make its views felt. On the contrary, the provision for a declaratory opinion is a way to stabilize the agreement between the two countries without freezing the present law in either country. It enhances the power of each country's legislative branch, by substituting impartial opinions for the often strident argumentation of advocates, including executive branch officials, that a given proposal is contrary to the international obligations of the United States (or Canada).[22]

3. Appointment and Functioning of the Panels

As I understand Chapter Nineteen, and in particular Annex 1901.2, the members of the panels would be chosen by consultation

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[22] I have myself recently been involved in such a debate. A proposal to amend the U.S. antidumping laws was adopted by the House of Representatives as part of the proposed Trade and International Economic Policy Reform Act of 1987, and the administration, which opposed the amendment or policy grounds, advised the Congress that it was "GATT-illegal." The proponents asked me for my opinion. My conclusion (without taking a position on the wisdom of the amendment) was that the proposal was not precluded by any provision of the GATT. See 120 Cong. Rec. S10366-70 (July 21, 1987). Nine months later the Office of the U.S. Trade Representative issued an opinion to back up its contention, opposed to my conclusion. The question was not free from doubt, and the arguments were technical. Under the U.S.-Canada Free Trade Agreement, such a question could be referred to a panel that would view the issue in legal terms, without any temptation to bend the legal arguments to fit a political agenda.

from among rosters maintained by the two Parties strictly on the basis of the members' individual reputations and expertise, including familiarity with international trade law and experience with dispute settlement. While panel members will doubtless bring with them their training, background, and possibly prior experience in government, they will not be representatives of the government that designates them. Clearly United States citizen members of panels will not be "officers of the United States," either for Constitutional purposes or for purposes of pay, retirement, security clearance or other indicia of employment. Annex 1901.2 provides expressly that "in no event" may a panel member take instructions from either Party. The plan thus is analogous to service on dispute settlement panels under the General Agreement on Tariffs and Trade and the MTN codes, which often involve U.S. citizen expert panelists, along with panelists from other states, all of whom are committed to independent assessment of the trade disputes submitted to them.[23]

Participation by the United States in international dispute settlement arrangements has a long history, going back to the Jay

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[23] See, for a recent instance, GATT, United States Customs User Fee, Report by the Panel to the Contracting Parties GATT Doc. L 16264 (25 Nov. 1987), concerning a complaint of the European Economic Community and Canada against certain practices of the United States. The unanimous panel consisted of a United States expert, Prof. Robert Hudec of the University of Minnesota, along with GATT experts from Australia and Uruguay.

Treaty of 1794,[24] Mixed Claims Commissions with Germany following World War I,[25] with Mexico at several times,[26] and most recently the Iran-United States Claims Tribunal, presently functioning in the Hague. Perhaps the most pertinent precedent is the United States-Canada Joint Commission created in 1909[27], which has functioned continuously since that time, with an equal number of Canadian and United States Commissioners and a co-chairman from each country. So far as I know, participation in these and comparable institutions has never raised any constitutional problems.[28]

It is worth pointing out that in a well-functioning dispute settlement body, it is by no means true that all members always support the position advocated by the country of origin. For

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[24] Treaty of Amity Commerce and Navigation between the United States and Great Britain, 8 Stat. 116; T.S. 105; 12 Bevans 13, signed at London, Nov. 19, 1794.

[25] See Agreement Creating a Mixed Claims Commission between the United States and Germany, signed at Berlin, August 10, 1922, 42 Stat. 2200.

[26] See Feller, The Mexican Claims Commissions 1923-34 (1935). See generally Restatement (Third) of Foreign Relations Law §903, esp. Reporters' Note 8 and sources there cited.

[27] Treaty relating to the Boundary Waters between the United States and Canada, 36 Stat. 2448; TS 548; 12 Bevans 319, signed at Washington Jan. 11, 1909.

[28] A challenge was raised to creation of the Iran-U.S. Claims Tribunal pursuant to the Algiers Accords in 1981, but the challenge related to termination of actions pending before U.S. courts and to creation of the Tribunal by executive agreement, not to participation in the dispute settlement process itself. The challenge, of course, was unsuccessful. See Dames & Moore v. Regan, 435 U.S. 654 (1981).

example, in more than 110 applications and references considered by the United States-Canada Joint Commission over a 75 year period, dissenting opinions were issued in only four cases, and in only two of these were the dissents divided along national lines.[29] The decision of the negotiators of the Free Trade Agreement not to make provision for third country or "neutral" arbitrators, as in the Iran-U.S. Claims Tribunal, is well justified by experience. If the dispute settlement provisions of Chapter Nineteen of the Free Trade Agreement function smoothly, the panels may be expected to develop an institutional tradition of their own, removing trade disputes from the political arena, and bringing over time relative certainty to the expectations of exporters and importers between the two countries.

Having stated above that designation of United States citizens as members of rosters and panels under the Agreement would raise no separation of powers or other constitutional problems, I would add only one reservation. I understand that there has been some suggestion that judges of the Court of International Trade and perhaps other U.S. courts might be designated to serve on the panels, and Annex 1901.2(1) appears to contemplate that possibility. I believe that the use of sitting judges for this purpose would be a mistake. From an institutional standpoint, participation by some judges along with other non-judges might well impede the collegiality of decision-

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[29] See Bilder, "When Neighbors Quarrel: Canada-U.S. Dispute Settlement Experience" pp. 54-44 (Inst. for Legal Studies, Univ. of Wisconsin Law School 1987).

making, and would run counter to the task of building a commitment by the panel members to the process. As a constitutional matter, it might well be improper for Article III judges (which includes judges of the Court of International Trade)[30] to carry out some kinds of non-Article III functions, such as giving what are in effect binding rulings on Canadian law under Article 1904, and giving in effect advisory opinions on United States law under Article 1903.[31] I would see no objection to nomination of some former or retired judges to the roster of panel members, though it would be important not to neglect the criterion of familiarity with international trade law stated in Annex 1901.2 of the Agreement.

IV. The Critique of Professor Shapiro

1. Due Process and the Need for U.S. Courts

I believe it is clear that persons participating in administrative proceedings, including proceedings concerning assessment of antidumping or countervailing duties, are entitled to due process of law. In connection with adjudicatory administrative proceedings, due process includes notice, decision on the basis of a record, the right to be heard, and the right to be represented by counsel; in addition, due process probably

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[30] See note 19 supra.

[31] Compare, e.g. Application of President's Commission on Organized Crime, Subpoena of Scaduto, 763 F.2d 1191 (11th Cir. 1985) holding that participation of federal judges on the President's Commission on Organized Crime violated separation of powers doctrine.

includes some kind of impartial review of the administrative action, at least to correct arbitrary action, manifest error of law, or findings unsupported by the evidence. Professor David L. Shapiro, in his interesting and thoughtful letter to the House Judiciary Committee of February 2, 1988, has suggested that such a due process right to impartial review can be satisfied only by an Article III court. I disagree.

The essence of due process, in my view, is that review of the administrative proceeding be fair, with opportunity by affected persons to submit legal arguments, and to expose the administrative record to the kind of scrutiny that reviewing authorities normally extend to adjudications by expert regulatory bodies. See, Administrative Procedure Act, 5 U.S.C. §§556, 557, 706. I see no reason for questioning the ability of a panel created pursuant to Chapter Nineteen of the Free Trade Agreement to conduct such a review.

In Dames & Moore v. Regan, 453 U.S. 654 (1981), the U.S. Supreme Court upheld creation of the Iran-United States Claims Tribunal as an exclusive forum for adjudicating claims of American citizens against Iran, despite the hectic circumstances of its creation and despite the frank expression of doubt in the majority's opinion about the chances of United States claimants before the Tribunal, 453 U.S. at 687. Surely there can be no doubt about the due process to be accorded by a United States-Canada panel, made up of jurists chosen by two countries sharing a common language, legal tradition, and commitment to fair play,

and operating pursuant to procedures for resolution of disputes concerning trade between Canada and the United States, created in more than a year of negotiations and with careful terms of reference.

Professor Shapiro refers to the talismanic concept of an Article III court, as if such a court were the sine qua non of due process. I see no basis for such a conclusion, and a good many indications that the U.S. Supreme Court, in an international context, thinks otherwise. In The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), for instance, the Supreme Court remitted the parties, including an American corporation as claimant, to the High Court in London, which might (or might not) give effect to an exculpatory clause in a towage contract that might (or might not) be held invalid in a United States court. Over the dissent of Justice Douglas, who feared that the American company's rights would be adversely affected, the Court held that "in the light of present-day commercial realities and expanding international trade...the forum clause should control absent a strong showing that it should be set aside", 407 U.S. at 15. Plainly, if the Court had thought that due process was an American monopoly, it would not have ordered a result that ousted the jurisdiction of a United States court that had the parties and a security before it. "Selection of a London forum," the Court said, "was clearly a reasonable effort to bring vital certainty to this international transaction and to provide a neutral forum experienced and capable in the resolution of

admiralty litigation." Substitute the binational panels for the High Court in London and "trade" for "admiralty", and the quotation from Zapata can provide all the rationale needed for the dispute settlement arrangement contained in the Free Trade Agreement.

Zapata involved remission to another court (albeit not a U.S. Article III court), and it was not clear what law was to be applied. In Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), in contrast, the chosen forum was not a court, and the law of Illinois, (including evidently United States law) governed the dispute between the parties, again including an American corporation as claimant. The Court, again over the dissent of Justice Douglas, remitted the parties to arbitration in Paris by an ad hoc panel to be established in accordance with rules of an arbitral institution. The Court quoted from Zapata: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." 417 U.S. at 519, quoting from 407 U.S. at 9. In Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), where unlike Zapata and Scherk no prior agreement was involved, the court ordered the parties, again including an American company, to litigate their dispute in Scotland, though it might well turn out that Scottish law would be applied, or that a Scottish court would apply the law of one of the states of the United States. Most recently in Mitsubishi Motor Corp. v. Soler Chrysler Plymouth Inc., 473 U.S. 614 (1985), the Supreme Court ordered the

parties, including an American party as defendant and counterclaimant, to litigate their dispute through arbitration in Tokyo and applying Swiss law, though claims were made under the Puerto Rico Dealers' Contract Act and the Sherman Antitrust Act.

In each of these cases, (putting aside differences not here relevant) the claim was made and accepted by the respective Courts of Appeals that due process required adjudication before a United States court established under Article III; in each case, the Supreme Court reversed, rejecting the idea that justice and fairness could be obtained only in the United States. In none of the cases was the forum to which the dispute was committed a U.S. court, and indeed in two of the cases the designated forum was not a court at all, but an ad hoc arbitration panel. So long as the forum was a fair one -- not, for instance, a people's court in Teheran[32] -- the U.S. Supreme Court in the late twentieth century has had no difficulty in finding the essential elements of due process satisfied in fora other than those over which it has direct supervision. Surely, neither lifetime tenure, nor appointment by the President of the United States, nor indeed permanence of the tribunal, emerges as a requirement of -- or indeed even as evidence of -- fairness in adjudication. While these characteristics have a peculiar history and value in our federal constitutional system as it has developed, it has never been suggested that these values can be regarded as the litmus

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[32] Compare Rockwell International Systems v. Citibank, 719 F.2d 583 (2d Cir. 1983); McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985).

test of due process generally.[33]

2. The International Character of Antidumping and Countervailing Duties.

Professor Shapiro, in the letter cited above, distinguishes cases that are "inherently international in character," such as controversies concerning fishing rights in disputed bays, from purely internal cases, such as those involving collection by the United States of a tax. He would concede the acceptability of submitting the controversy between Canada and the United States over fishing in the Gulf of Maine to a chamber of the International Court of Justice -- see Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada-United States), [1984] I.C.J. Rep. 246[34]. But, he writes, "the level of import duties is a matter wholly within the control of the importing nation unless and until those duities are made the subject of international agreement." I think such a distinction may be valid if the tax in question is, say, a personal income or estate tax. Import duties, in my view,

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[33] It goes without saying that the judiciary of many states of the Union does not meet the tests of Article III judges. No one has suggested that elected judges are a priori incapable of according due process.

[34] Note that none of the judges of the International Court of Justice has life tenure, and that while they are by statute independent, they are elected, rather than appointed. See, Statute of International Court of Justice, Chapter I, 59 Stat. 1055, T.S. 993, 3 Bevans 1170. Until now, there has always been a United States judge on the International Court of Justice designated by the President, in exercise of the foreign affairs power for submission to the vote of the U.N. General Assembly and Security Council.

are inherently of an international character, since their primary function is not, in twentieth century America, to raise revenue, but to control the volume and price of trade.[35] The international character of import duties is particularly apparent in the case of countervailing duties, since such duties depend on an examination by the importing state of practices of a foreign government. Quite apart from the fact that both the practices and the countervailing measures are subject to international agreement -- the GATT and the Subsidies Code (as well as the Free Trade Agreement itself), consider what is involved in a proceeding seeking information of a countervailing duty. Is a harbor improvement, or a land grant, or a tax deferral a subsidy? If so, is it on a product? Is it "unfair", or against the international rules? What about educational allowances, defense-related research, devaluation of currency? There is much learning, and a good deal of disagreement about these questions -- disagreement that a decade ago proved too much for the U.S. Supreme Court to sort out. See Zenith Radio Corporation v. United States, 437 U.S. 443, esp. at 458-59. To call the issue of subsidies and countervailing duties purely internal, or purely a matter of taxation, I submit, is to profoundly misunderstand the nature of the problem.

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[35] See, e.g., Dobson, Two Centuries of Tariffs p. 31 (1976), showing the decline in the share of federal revenue attributable to tariffs from about 90 percent in 1800 to less than 2 percent in 1960. The relevant chart is reproduced in Lowenfeld, Public Controls on International Trade p. 105, (2d ed. 1983).

An antidumping case may have somewhat less of a political character, because it usually does not involve attack upon governmental activity. But the nature of an antidumping proceeding, requiring exploration of home market prices, discount and rebate practices, and the effect of a variety of internal taxes and charges, makes such a proceeding no less international in character than an anti-subsidy case.

There is, of course, law applicable to antidumping and countervailing duty proceedings, just as there is law applicable to expropriation claims, boundary disputes, fishing rights, transborder pollution, and a host of other subjects that involve intercourse and dispute among nations. The syllogism that a duty is a tax, a tax is imposed by statute, courts interpret statutes, therefore only national courts can determine the outcome of a countervailing or antidumping duty proceeding is, I submit, unsound and unpersuasive.

3. Challenging the Procedure

It is of course, possible to hold a view contrary to the one I have expressed, as witness the doubts of Professor Shapiro and others, possibly even including some persons in the Justice Department. A party who believes his constitutional rights have been abridged by the U.S.-Canada Free Trade Agreement ought to be able to submit his contentions to a United States court, with the possibility of review by the U.S. Supreme Court.

I understand that some suggestions have been made in proposals for implementing legislation for a special procedure--

indeed even a special three-judge district court -- to hear such a constitutional challenge. I believe there is no need thus to build up the issue. I would think that a person who but for the Free Trade Agreement would have the right to challenge a determination of the Department of Commerce or the U.S. International Trade Commission before the Court of International Trade could attempt to bring his petition in that court (or possibly in one of the district courts). Presumably the U.S. government would move to dismiss the petition for want of jurisdiction, in reliance on Article Nineteen of the Free Trade Agreement as accepted and approved by Congress. Whichever way the Court of International Trade (or district court) ruled, its decision could be reviewed by the Court of Appeals for the Federal Circuit (or another Circuit), and (possibly even before judgment) by the U.S. Supreme Court. This was the route taken in Dames & Moore v. Regan, supra in connection with the Iran-U.S. Claims Agreement, and it proved satisfactory both in terms of putting the issues on the table and in securing expeditious decision of a matter with important foreign relations consequences. Once the issue had been decided by the Supreme Court, it is unlikely that future cases would arise.

Conclusion

I believe the provisions of Chapter Nineteen of the proposed Canada-United States Free Trade Agreement constitute a resourceful solution of a difficult problem -- how to fit

national procedures concerning unfair trade practices within an overall scheme that would eliminate barriers to trade between the two countries. Since eliminating all unfair trade remedies in trade between Canada and the United States was not politically acceptable, and harmonizing the criteria (beyond the framework provided by the GATT and the MTN codes) proved too difficult within the time allotted to the negotiations, the compromise of bilateral review of unilateral decisions is both creative and fair.

One may look forward to gradual harmonization of the perceptions and practices of the two nations, as a body of precedent builds up in the decisions of the binational panels. No basic rights of any party -- American or Canadian, importer, exporter, or domestic competitor -- would be jeopardized by the proposal for review by binational panels of the administrative determinations of each country's authorities in antidumping and countervailing duty cases. If the Canada-United States Free Trade Agreement is acceptable on other grounds, there is no legal or constitutional impediment, in my view, to acceptance of the dispute settlement provisions of the Agreement, and no need to create additional judicial mechanisms to test this proposition.

Senator HEFLIN. The Finance Committee of the Senate recently met and adopted an either/or approach to resolving the controversy over whether panel decisions can be implemented directly by the Commerce Department or the International Trade Commission. The committee adopted language to the effect that such decisions are self-executing. In the event that this provision is found to be unconstitutional, they included language authorizing the President to direct the appropriate governmental agency to take the necessary actions to implement the agency decision.

Would you comment on the constitutionality of these alternatives? Second, do you see a problem with the President directing an independent agency?

Professor LOWENFELD. Well, let me answer the first question, and let Professor Bruff talk about the independent commission.

I think the Finance Committee proposal as you have just read it—and I haven't read the language—is better than what the Justice Department says.

I think the notion of self-executing is a peculiar word. What we think of is self-executing or non-self-executing international agreements. Here, of course, we have legislation, so that really doesn't arise.

If I am right in assuming that the binational panel stands in lieu of a court, we don't think of courts as giving self-executing judgments. I guess courts have sheriffs and marshals, but not when the government is involved. The court sends the decision to the appropriate government agency, and in effect says we assume that you'll carry it out. And if, for example, a duty is assessed, and the panel says that duty is improperly assessed because the agency used the wrong standard, well, the Customs Service is not going to collect the duty. I don't think you need to distinguish between "self-executing" and "non-self-executing" decisions; I don't really think you need the President in there; and I don't think there is really a constitutional problem.

The fall-back position has the difficulty Professor Bruff talked about, that you make the President into a kind of a clerk, but I think it is much better than giving the President discretionary authority which undermines the whole notion that this is a kind of judicial review.

As to the independent commission, perhaps Professor Bruff had better address that.

Professor BRUFF. I agree with what Mr. Lowenfeld says about the wisdom of the either/or provision, and I agree with his earlier remarks as well.

A couple of thoughts in general. One is that Congress learned painfully in the Gramm-Rudman statute that if you provide an alternative that seems a constitutionally safer course, the courts may leap to embrace it. Here, I don't think it is necessary to specify a vehicle for constitutional review because, as Mr. Lowenfeld has ably reviewed with you, the courts are apt to find a way.

I think it is enough just to not get in the way by precluding review of constitutional issues. The current Free Trade Agreement and the current drafts of the legislation are consistent with that point of view. They don't get in the way of Constitutional review.

On the point of orders to independent agencies, of course, there is no constitutional objection to Congressional authorization by statute of Presidential involvement in any affair of an independent agency. Congress may always qualify or remove an agency's independence. And as you well know, the Justice Department daily attacks independence as a matter of constitutional prerogative. So there is no constitutional impediment for you authorizing the President to do that.

I would be surprised to find Congress very willing to grant the President new authorities over the independent agencies.

Senator HEFLIN. Thank you.

I understand there will be questions submitted to you, and we are under the same time frame on return, so we'd appreciate it very much if you could get them back by close of business Monday. The committee staff will work with you.

Thank you very much.

Our last panel includes Mr. Andrew Vance and Mr. David Elliott, Customs and International Trade Bar Association, and Mr. Stewart Baker and Mr. Jeffrey Bialos, section of the International Law and Practice, American Bar Association.

Mr. Vance, if you will.

STATEMENT OF A PANEL INCLUDING ANDREW VANCE, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION; AND STEWART BAKER AND JEFFREY BIALOS, SECTION OF THE INTERNATIONAL LAW AND PRACTICE, AMERICAN BAR ASSOCIATION

Mr. VANCE. I am Andrew P. Vance, Chairman of the Trial and Appellate Practice Committee of the Customs and International Trade Bar Association, CITBA.

CITBA is a national professional association of lawyers who practice before the United States Court of International Trade and the Court of Appeals for the Federal Circuit. It currently has over 300 members from 19 States and the District of Columbia. It is the successor to the Association of the Customs Bar, which was founded in the late 1920's.

CITBA and its predecessor have offered opinions to Congress on measures affecting the United States Customs Court, the United States Court of Customs and Patent Appeals, and their successors, the CIT and the CAFC, and on certain trade measures for over a half-century.

Mr. David Elliott, the President of CITBA, regrets that due to a personal family emergency, he could not be present today.

CITBA is not opposed to a Free Trade Area Agreement with Canada. However, it vigorously opposes the dispute settlement provisions of the proposed Free Trade Agreement in that it withdraws judicial review on countervailing and antidumping matters from the United States courts and vests it in a five-member binational panel created on an ad hoc situation.

Mr. Chairman, we have submitted a rather complete statement and instead of reading it, I would like to have it in the record and speak in response to the matters I have already heard his afternoon, if it please the Senator.

I think first of all, I would like to try to put this back in context. I have been hearing about foreign affairs and international law, and I am rather surprised that I have been practicing foreign affairs and international law for the last 30 years. I am a customs lawyer and a trade lawyer, and I generally represent importers who are complaining about assessments of duty. Sometimes I represent petitioners who are American businessmen who complain about unfair trade practices from foreign exporters.

Now, the countervailing duty law was passed in 1890; the antidumping law, in 1921. All of this time, and even from the date of the founding of the Republic, importers have had the right to go to court to contest assessments of duty. There was a short time, 3 or 4 weeks, under *Cary* v. *Curtis,* when the Supreme Court sort of withdrew the right to sue the collector directly, although it said there were other rights and other ways that an importer could question the assessment of duty. Congress came right back and said, "No, that isn't what we meant. We didn't mean that you couldn't sue the collector."

The Supreme Court in *Glidden* v. *Zdanok* and also in the *Thomas* v. *Carbide* and *Northern Pipeline* cases, have said these are the kinds of matters, common law rights, from the date of the Revolution and before, that remain the core of article III judicial matters.

All the time, we have had the right as importers to be able to go to court and question the legality, the correctness, of the assessment of duties. Since the 1970s, Congress wisely expanded that right of judicial review to American manufacturers, petitioners, labor unions, consumer groups, and even exporters. We don't claim a constitutional right for them, because it doesn't come from our common law. But we say it was good policy to do so, and we question whether or not you wish to withdraw it.

Now, what are the decisions that are going to be made by this binational panel? The ultimate decision affects either, an assessment of duty on importers if dumping is found or if there are subsidies found, or, if there is a denial of relief to an American petitioner—perhaps the closing of his plant, the loss of business.

I recently received from a firm in Toronto a booklet entitled, "A Guide to the Canada-United States Free Trade Agreement." And on page 65, they recogize something I think is very important—I am quoting—"the FTA, recognizing that antidumping and countervailing duty cases are essentially private actions"—it is a private individual who initiates a dumping proceeding before the ITA, and eventually the ITC, in determing injury as against dumping. And he is complaining, not a governmental action—he is not complaining in the case of Canada is dumping. He is complaining that a particular manufacturer in Canada has of its own volition designed to sell merchandise in this country at less than its fair market value in Canada. It is an individual, a petitioner, an American manufacturer, who complains about subsidy.

Now, it is true that the subsidy laws may be Canadian laws, but the question comes down to whether or not the exporter has availed itself of those particular subsidies. So again, the tests are on the basis of individual companies abroad, and the complainants or the sufferers are individuals in the United States.

The other question I hope the Senate will consider is why do we need this. First of all, we are told Canada didn't ask for this. They are complaining about antidumping and countervailing duty laws. So why, suddenly, are we replacing judicial review—which Mr. Holmer, even in September of this year said has been operating fine; Congress hasn't been bothered by people who are unhappy—and Senator Grassley asked the question what happens if they are unhappy. I would assume the interpretation would be under the arguments I have heard that there is nothing Congress could do because it would violate international law.

But why do we need to do something that has no precedent, because the Jay Treaty having to do with our boundaries and other things like that didn't involve individuals; it involved international questions. Why do we need this for 5 or 7 years to take care of less than 2 percent of the litigation in the courts?

Why do we need it except to set a precedent? Again, it's administrative agencies trying to do away with judicial review, and I think that's basically what it is. Judicial review under the means of our tripartite type of government is essential to the freedoms that we have had.

I have not understood at all the arguments as to why this is the linchpin in this agreement. We are told there are billions of dollars at issue here. Do you really think Canada is going to withdraw from this agreement if we delete the binational review provision? I think they would be foolish if they did so. But I think it would be wrong for us to give up a right which has been jealously guarded by the Congress and the courts. Congress is the one that recognized that these courts are article III courts in the 1950's. It stated it, and the Supreme Court so found in 1962.

I heard this morning a lot of testimony to the fact that this is international law that is going to be interpreted by the body. However, I have also heard an admission that after all it is domestic law that they are going to be interpreting, and we are going to have one body of law for 2 percent of our cases, that now Professor Lowenfeld would hope that our courts would also take notice, and another kind of law for 98 percent.

What happens when a case involves Canada and other nations? Is one part of that decision going to Canada and the other part going to the CIT? What kind of protection is that going to be?

Is this not in a sense an attempt to circumvent domestic law which everybody including the Canadians have said they have no objection with the way our courts have been operating; maybe they'd like them to operate a little faster. But what procedure is there in this binational panel to make the binational panels agree or fulfill the requirements of the procedures or the timing? There is no court that anybody before the binational panel can go to to say hey, a writ of mandamus—where could they go to get a writ of mandamus?

And I have also heard the final admission, which was one of the things that we are concerned about, and sometimes it will be the two governments on one side against an American petitioner. He is going to feel like he is really getting impartial justice when a panel is chosen by the two governments to decide something about which his economic future can be at stake.

I might also point out where there has been some comment about this extraordinary review panel, if someone feels that there has been an erroneous interpretation, that that panel can be convened only by the governments; it cannot be convened by private parties.

So it seems to me that however much you try to make these binational panels like courts and procedure or anything else like that, you are not replacing or surrogating judicial review, because part of judicial review is that there is an appeal from the lower court to an appellate court and from the appellate court, the possibility of certiorari by the Supreme Court.

I don't want to take up more of the Senator's time. We could go on with this for a long time. But it does concern us as a matter of principle. It was not an easy decision for our Bar, and I am sure also for the Federal Circuit Bar Association, to take this position. But we thought it essential and concern with the constitutional implications to speak up regardless of what it does with clients' interests or anything else. We certainly wouldn't lose any business; we would have business before the binational panels, I am sure.

But we don't want to see the beginning of an erosion of our essential rights to judicial review, and that's what we think this has begun to be.

Thank you, Senator.

[The statement follows:]

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION'S SUPPLEMENTAL STATEMENT IN OPPOSITION TO THE BINATIONAL DISPUTE SETTLEMENT PROVISIONS IN CHAPTER NINETEEN OF THE CANADA-UNITED STATES FREE-TRADE AGREEMENT WITHDRAWING JURISDICTION FROM UNITED STATES COURTS TO REVIEW ANTIDUMPING AND COUNTERVAILING DUTY DECISIONS OF FEDERAL AGENCIES INVOLVING CANADIAN MERCHANDISE

ADOPTED BY THE BOARD OF DIRECTORS
CUSTOMS AND INTERNATIONAL TRADE
BAR ASSOCIATION

March 8, 1988

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION'S SUPPLEMENTAL STATEMENT IN OPPOSITION TO THE BINATIONAL DISPUTE SETTLEMENT PROVISIONS IN CHAPTER NINETEEN OF THE CANADA-UNITED STATES FREE-TRADE AGREEMENT WITHDRAWING JURISDICTION FROM UNITED STATES COURTS TO REVIEW ANTIDUMPING AND COUNTERVAILING DUTY DECISIONS OF FEDERAL AGENCIES INVOLVING CANADIAN MERCHANDISE

I. Introduction

On December 3, 1987, the Board of Directors of the Customs and International Trade Bar Association adopted a Statement in opposition to the withdrawal of jurisdiction in the United States Court of International Trade and its appellate tribunals to review antidumping and countervailing duty decisions of Federal agencies involving Canadian merchandise.

The Statement was adopted in response to the initialed agreement of October 30, 1987, and in contemplation that the policy and constitutional questions raised therein would be considered in the negotiations which it was believed that the Executive and Legislative Branches of the Government would engage in prior to agreement to the Final Text. This unhappily did not occur and the Final Text was agreed to on December 9, 1987, without that prior consultation which had been expected.

In view of the Final Text and the expected submission of the Agreement to the Congress with implementing legislation within the near future, the Association has reexamined the position set forth in its December 3 Statement, and unanimously adopted this Supplemental Statement at its meeting of March 8, 1988. It adheres to its opposition to the divestiture of the jurisdiction of the United States courts to review antidumping and countervailing duty decisions of the International Trade Administration of the Department of Commerce (ITA) and of the International Trade Commission (ITC) on Canadian merchandise. The Final Text, while removing some of the ambiguities in the

initialed summary, spells out the denial of judicial review in these matters to which we continue to be opposed both on policy and constitutional grounds.

This Statement fleshes out the constitutional bases of our objections. We did not attempt to do so in our December 3 Statement because of the time restraints and the strength of the policy reasons against denial of judicial review. We continue to believe in those policy arguments[1] and while we will summarize them in this Statement, as well as discuss particular provisions of Chapter Nineteen of the Agreement, we will emphasize the constitutional issues which we believe should compel the deletion of this chapter from the Agreement.

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1. The policy arguments hitherto advanced for retaining judicial review were highlighted recently in an article in the Fall 1987 issue of The International Lawyer co-authored by Alan F. Holmer and Judith Hippler Bello, then General Counsel and Deputy General Counsel for the U.S. Trade Representative, writing on "The U.S.-Canadian Lumber Agreement: Past as Prologue". The authors there stated, at pp. 1197-1198:

> The lumber agreement and the developments leading to it are significant for several reasons. First, the evolution of the CVD law in general and of the specificity and subsidy tests in particular reflect Commerce's and the court's intellectual honesty and openmindedness in interpreting and applying the CVD law. The Department has shown that it is willing to reconsider issues if interested parties marshall appropriate information and arguments warranting reconsideration.
>
> Second, the litigation spawned by the 1983 Commerce decisions on natural resources demonstrates the importance and effectiveness of the substantially increased judicial review provisions enacted by the Congress in 1979.* Congress intended to provide more opportunities for judicial review, in large part as a check on Executive Branch discretion in administering the countervailing duty and antidumping laws.* Recently the courts have played a significant role in shaping the course of the CVD law. At least theoretically, this should reduce the pressure that disappointed U.S. petitioners attempt to apply to the Congress to amend the law whenever Commerce makes any determination adverse to their interests.*

* (Footnotes are omitted.)

II. The Denial of Judicial Review of ITA and ITC Final Antidumping and Countervailing Determinations is Unconstitutional

1. Introduction

It is important to understand that the binational panels in reviewing ITA and ITC Final Antidumping and Countervailing Determinations will be reviewing domestic United States statutory provisions.[2] The effect of the panels' decisions can result in the assessment of dumping or countervailing duties on an importer or the denial of relief to a petitioner whether a United States manufacturer, producer, wholesaler, labor union, or consumer group seeking to have such duties assessed. Both the countervailing and antidumping laws antedate the FTA (Canada-United States Free-Trade Agreement) by over sixty years, the origins of the present countervailing duty statute being section 5 of the Tariff Act of 1897[3] and that of the antidumping provisions, the Antidumping Act of 1921.[4]

International agreements, like statutes, must conform to the Constitution. Reid v. Covert, 354 U.S. 1, 16-17 (1957); The Cherokee Tobacco, 78 U.S. 616, 620-21 (1871). Accordingly, it is impermissible for such agreements to modify the basic character of the Government as contemplated by the Constitution. Speaking specifically with respect to treaties, the Supreme Court stated in Geofroy v. Riggs, 133 U.S. 258, 267 (1890):

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2. Article 1902 of Chapter 194 of the Agreement provides that "Each party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party." (Emphasis added.) Article 1911 spells out what the statutory provisions are.

3. Act of July 24, 1897, 30 Stat. 151.

4. Act of May 27, 1921, c. 14, 92 Stat. 11.

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. [Emphasis added.]

This passage from Riggs was quoted and endorsed in the more recent case of Reid v. Convert, supra, 354 U.S. at 17-18. There, an argument was made that a treaty could be the basis for denying a U.S. citizen a right protected by the Sixth Amendment. Speaking in a plurality decision, Mr. Justice Black stated (354 U.S. at 15-17):

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. *** The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Justice Black further stated (354 U.S. at 5-6):

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. [Footnote ommitted.]

It is therefore clear that the trade agreement in question must conform to the Constitutional scheme of the Government. The agreement is constitutionally defective to the extent it fails to conform to that rule.

A. The Binational Panel Would Modify the Basic Scheme of the National Government

Articles I, II, and III of the Constitution place the powers of the National Government in the three specifically identified Branches: the Legislature, the Executive, and the Judiciary, respectively. Accordingly, the power exercised by the Government must be exercised by one of these identified Branches or by an agency or other delegatee lawfully empowered to perform a governmental role. Logically, it would modify the

character of the Government if any power defined by the Constitution were exercised by any other body or organization.

In broad terms, three inquiries are required to determine whether the binational panel is constitutional in the contemplation of Articles I, II, and III. The first can assume that the panel would perform a function essentially judicial in nature, and with this assumption the question then becomes whether the panel conforms to Article III. The second can assume that the panel would perform a function essentially legislative in nature, like the functions performed by "administrative courts" established by Congress under Article I (such as the Tax Court and the Court of Military Justice). When this is assumed the question becomes whether Congress may constitutionally delegate legislative power to an international forum like the binational panel which is in no way a part of the United States Government but which would perform an important law-making function. Finally it can be asked whether the establishment of the panel can be justified by inherent powers in the Executive. If the answer to all of these questions is "no", the panel is outside the scope of the Constitution and is therefore an unconstitutional institution.

For one thing, it is not an "inferior" court, i.e., a court inferior to the U.S. Supreme Court. For another, its members are not Federal judges appointed for life during good behavior. The panel therefore fails, for these reasons alone, to meet the standards of Article III, so Article III cannot be the basis for justifying this would-be institution. See, generally, Glidden Company v. Zdanok, 370 U.S. 350 (1962).

B. The Binational Panel Would Violate Article III of the Constitution

Article III provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." We believe that the attempt to preclude judicial review of ITA and ITC dumping and countervailing duty determinations that result in increased

duties would be found unconstitutional as an attempt to give to the binational panel powers belonging properly to the courts of the United States.[5]

In 1956 both the Senate and House Judiciary Committees, in reports in support of the Act of July 14, 1956 recognizing the predecessor of the CIT as an Article III Court, observed:

> Customs Court handles cases which very properly come within the judicial power of the United States as set forth in article III, which provides that such judicial power shall extend to controversies to which the United States shall be a party. Thus, there can be no doubt that the Customs Court should be a constitutional Court.

In 1962 the Supreme Court blessed this action and held that Customs litigation properly belonged in an Article III Court. Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

Since that time the Supreme Court in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) and Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985) has recognized that whether a public rights vs. private rights rationale is used or not,[6] if the subject matter of the suit was recognized at common law or in equity at the time of the founding of the Republic, review by an Article III Court is required. As the majority said in Thomas, supra, (p. 587):

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5. See Justice Brennan's concurring opinion in Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 594 ff (1985); and Justice Brennan's plurality opinion in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

6. Note Justice Brennan's comment on this point in Thomas as he refers to his opinion in Northern Pipeline:

> I agree with the Court that the determinative factor with respect to the proper characterization of the nature of the dispute in this case should not be the presence or absence of the Government as a party. See ante, art 586, 87 L Ed 2d, at 423. Despite the Court's contrary suggestions, the plurality opinion in North Pipeline suggests neither that "the right to an Article III forum is absolute unless the Federal Government is a party of record" nor that "Article III has no force simply because a dispute is between the Government

> Most importantly, the statute in Crowell displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire. Thus it clearly fell within the range of matters reserved to Article III courts under the holding of Northern Pipeline. See 458 US, at 70-71, and n 25, 73 L Ed 2d 598, 102 S Ct 2858 (plurality opinion) (noting that matters subject to a "suit at common law or in equity or admiralty" are at "protected core" of Article III judicial powers); id., at 90, 73 L Ed 2d 598, 102 S Ct 2858 (opinion concurring in judgment) (noting that state law contract actions are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789").

Given the historical fact of customs duty suits in law or equity in England and pre-constitutional United States[7], the clear expression of Congress in its 1956 recognition of the CIT's predecessor as an Article III court and the holdings of the majority of the Supreme Court on the constitutional requirement for Article III court review, there can be no doubt that the binational panel review of duty assessments against U.S. importers would be in violation of Article III.

Also, merely providing for judicial review of constitutional issues would not solve the problem for the questions raised in Customs litigation are judicial in nature[8] and their resolution by a non-judicial, non-United States body violates the tri-partiate nature of our Governmental system and denies to the importer citizen the protection afforded

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(cont.)

and an individual."

7. Washington International Insurance Co. v. United States, ___ CIT ___, F. Supp. ___, Slip Op. 88-4 (January 12, 1988).

8. See generally Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 7 L.Ed. 2d 761, reh'g. denied, 371 U.S. 854, 83 S. Ct. 14, 9 L.Ed. 2d 93 (1962).

by an impartial and independent judiciary.[9]

C. The Binational Panel Procedure Would Violate the Due Process Provisions of the U.S. Constitution

The Supreme Court has "traditionally" held that "the Due Process Clauses protect civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances". Logan v. Zimmerman Brush Co., 455 U.S. 422, 429, 71 L.Ed. 2d 265, 273 (1982).

The fact that a trial or hearing has been provided does not mean that due process has been completely satisfied. "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377, 28 L.Ed. 2d 113, 118 (1971).[10] This "opportunity" should be one which allows "for a hearing appropriate to the nature of the case" Id. 401 U.S. at 378, 28 L.Ed. 2d at 119 (quoting Mullane

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9. The Court in Northern Pipeline, supra was adamant on this subject (73 L.Ed. 2d 608):

> In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

10. The Court held that the refusal to permit indigent persons to bring divorce actions except on payment of court fees and service-of-process costs which they were unable to pay was a denial of due process.

v. Central Hanover Trust Co., 339 U.S. 306, 313, 94 L.Ed. 865, 873. (1950)).[11] However, "due process does not always require a full and formal adversary hearing." Ong v. Tovey, 552 F.2d 305, 307 (9th Cir. 1977).[12]

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 332, 47 L.Ed. 2d 18, 31 (1976).[13] The Court in Mathews went on to state that when a property interest is concerned, "some form of hearing is required." Id. at 333, 47

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11. The Mullane case involved a New York statute which allowed trust companies "to pool small trust estates into one common fund for investment administration." 339 U.S. 306, 94 L.Ed. 865 (1949). The statute also provided for "notice to interested beneficiaries of a petition of such trust company for judicial settlement of its accounts by publication in a local newspaper, setting forth merely the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds". Id. The issue decided by the Court was whether the above notice satisfied the requirements of due process. The Court held that such method of notice did not satisfy due process as concerned the known beneficiaries of these trusts. Id. at 320, 94 L.Ed. 876.

12. Ong v. Tovey involved the termination of a resident physician from the Public Health Service (PHS) Hospital surgical residency program. The Court of Appeals for the Ninth Circuit held that where the resident physician in question has been afforded the opportunity to discuss his deficiencies "...at meetings at which he and his attorney had [the] opportunity to question the other doctors and decision makers about how they arrived at their decision and to present his side of the story . . ." due process was not violated. 552 F.2d 305.

13. The Mathews case concerned whether the "Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." 424 U.S. 323, 47 L.Ed. 2d 26. The Supreme Court responded that an evidentiary hearing was not necessary in that the existing administrative procedures under the Social Security Act fully satisfied due process. Id., 47 L.Ed. 2d at 25.

L.Ed. 2d at 32.[14] It should be noted that a cause of action has been held to be "a species of property protected by the Fourteenth Amendment's Due Process Clause." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428, 71 L.Ed. 2d 265, 273 (1982),[15] citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 94 L.Ed. 865 (1950).[16] The Court in Logan, supra, went on to state that: ". . . having made access to the courts an

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14. "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society'." Id., (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168, 95 L.Ed. 817 (1951)) (Frankfurter, J. concurring). (Termination of government employees due to membership in organizations designated either as "Communist" or "Subversive" without notice and a fair hearing is unconstitutional).

15. The issue in the Logan case was whether a cause of action could be terminated, if the termination was due to a failure to follow procedure on the part of a state official and not the plaintiff. The plaintiff in Logan filed charges against his employer with the Illinois Fair Employment Practices Commission for having unlawfully terminated the plaintiff's employment on the basis of the plaintiff's handicap. The Commission scheduled a "fact finding conference" 5 days after the statutory 120 days in which they had to schedule such a conference. The Supreme Court held that the action could not be terminated as it would deprive the plaintiff of a protected property interest.

16. There are several cases which have held that there is a "Right of Access to Courts" which is a fundamental right protected by the Constitution. In Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983), the Court described this right as "basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." (Ryland involved a suit against state agents for having interfered with the plaintiff's right to institute wrongful death proceedings.) Bases for this right of access were also found in the First Amendment and the Due Process Clause. Id. at 972.

In Doe v. Schneider, 443 F. Supp. 780, 784 (D. Kan. 1978) (Action to enjoin state officers from destroying files containing information on the plaintiffs which had no lawful or valid purpose), the right to access to courts was described as a "concept which is nebulous at best." It was found by the District Court as most often finding its basis in the due process clause of the Fourteenth as well as Fifth Amendments as well as, in part, in the First Amendment. Id. The "right of access refers only to the right to petition the courts for redress of grievances" and not to obtain information to substantiate a claim. Id., at 787.

In Seoane v. Ortho Pharmaceuticals Inc., 660 F.2d 146, 151 (5th Cir. 1981), the Court of Appeals stated: "when a right is not fundamental, access to the courts may be restricted." Furthermore, "a party is not deprived of due process merely because it must seek administrative resolution of its claims before it has access to the courts." West Penn Power Company v. Train, 552 F.2d 302, 313 (3d. Cir. 1975) cert. denied, 426 U.S. 947, reh'g. denied, 429 U.S. 873 (1976).

entitlement or a necessity, the state may not deprive someone of that access unless the balance of state and private interests favors the government scheme." 455 U.S. at 430 n.5, 71 L.Ed. 2d at 274. Furthermore, "[w]hile the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Id. at 432, 71 L.Ed. 2d at 275, quoting from Vitek v. Jones, 445 U.S., at 490-491, n.6, 63 L.Ed. 2d 552,[17] quoting Arnett v. Kennedy, 416 U.S. at 167, 40 L.Ed. 2d 15, (opinion concurring in part).[18]

In Mathews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed. 2d 18, 33 (1976), the Court denominated a three point analysis in determining what due process "dictates":

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

While it is undoubtedly true that the amount of an importer's customs duty liability may initially be determined in an administrative proceeding such as that conducted by the ITA on Administrative Review, from the beginning of this Republic, and under the common law of England, an importer had the right to have the correctness of his duty assessments, and the decisions a part thereof, reviewed in a court of law by suits in assumpsit against the Collector or, subsequently, against the United States. The Dispute Settlement provisions attempt to deny that right to the importer and commit to a binational panel the power to interpret and apply United States domestic law and

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17. The involuntary transfer of a state prisoner to a state mental hospital without the benefits of notice and an adversary hearing violates the Due Process clause of the Fourteenth Amendment.

18. Discharge procedures for non-probational governmental employees did not violate the Fifth Amendment's procedural due process requirements although they failed to provide a "trial-type" hearing before the removal of the employee.

effectively set the importer's duty liability to the United States. The denial of a hearing on such a matter before an inferior court subject ultimately to review by the Supreme Court results, we believe, in the taking of an importer's property without due process of law.[19]

D. The Panel Cannot Be Justified Under Article II

It is impermissible for Congress to delegate important legislative power to an international forum like the binational panel, so the panel cannot be justified under Article II, assuming it would perform a legislative function like that of a typical "administrative court."

The reason for limiting delegations of power goes to the heart of our system of Government. Groups and organizations outside the Government are not politically responsible to the electorate, yet the Legislative Branch was always intended to be the most politically responsible Branch of Government. As explained by Professor Laurence Tribe in American Constitutional Law (1978) at 286:

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19. If it be deemed that the United States has simply withdrawn its consent to be sued in such matters, would that withdrawal then revive the common law right to sue the appropriate official? See Article VII of the Constitution preserving in common law suits the right to trial by jury. See also Washington International Insurance Co. v. United States, ___ CIT ___, F. Supp. _____, Slip Op. 88-4 (January 12, 1988) wherein in a 2-1 decision a three judge panel of the Court of International Trade held that in customs cases, an importer always has had, and has today, the Seventh Amendment right to trial by jury. In fact, an amicus in that case has filed a brief supporting the proposition that Customs cases are "at the core and heart of the judicial power under Article III"; that "[T]he Consitition itself provides that the government may not prohibit suits regarding the collection of customs duties"; and that the Customs Administrative Act of 1890, ch. 407, 26 Stat. 131, was unconstitutional "because it violated Article III by placing a core judicial function in an administrative agency [The Board of General Appraisers] and because it violated the Seventh Amendment trial by jury guarantee". See Brief of Amicus Curiae, Kalan Inc. filed March 4, 1988, in Washington International Insurance Company v. United States, Court No. 81-12-01678 (Court of International Trade).

> In general, limits on congressional capacity to delegate responsibility derive from the implicit constitutional requirements of consensual government under law. Under any theory that finds legitimacy in the supposed consent of the governed within a framework of constitutional limitations, the cooperative exercise of accountable power presupposes the possibility of tracing every such exercise to a choice made by one of the "representative" branches, a choice for which someone can be held both politically and legally responsible.

Of course, the binational panel would vest important legislative authority in ad hoc groups of private individuals, some of whom — many times, a majority of whom — would not even be citizens of the United States. This blatantly would be inconsistent with the notion of political responsibility.

E. Adoption of The Binational Disputes Resolution Panel Would Result in Unequal Protection of the Laws

In the prior sections we have discussed briefly the denial of due process and the abrogation of the judicial power inherent in the Binational Disputes Resolution Panel as applied to ITC and ITA dumping and countervailing duty provisions. There we have emphasized the abridgement of the importer's rights because he is the one who is assessed additional duties where there is an affirmative dumping or countervailing duty determination. Further, the importer's right to contest any such assessment has a common law basis. We have not referred to the petitioners in those proceedings or interested parties because theirs are statutory rights which, while obtained after years of efforts, may be withdrawn by the Congress. However, the Congress here is not limiting those rights as to all petitioners (American manufacturers, producers, or wholesalers; labor unions; consumers, etc.,) but only as to petitioners complaining about certain merchandise - that is merchandise from Canada.[20] Thus an American company facing unfair competition from dumped or subsidized goods from Canada will not be able to receive the full protection of our laws with regard to such merchandise which a

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20. Although it is already assumed that similar limitations will be sought by Israel with regard to its FTA with the U.S., and by Mexico in its FTA negotiations.

competitor might be able to obtain on similar goods being dumped or subsidized from another country. Also an importer of merchandise from Canada would be denied judicial review of an ITA or ITC determination while a competitor importing similar merchandise from another country would have recourse to such review.[21] Another example of disparity would be where the ITA or ITC investigate a product which is imported from Canada and other countries. The final determination as to injury, which may well be a cumulative determination in these kinds of cases, would be bifuricated with the Canadian aspect going to the binational panel and the other country aspects to the courts of the United States.[22] We think it not only unequal but unworkable.

This disparity in treatment obviously raises questions as to the guarantee of equal protection of the laws contained in the 14th Amendment to the Constitution, the tenets

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21. A simple illustration of this is as follows: A and B are both in the business of importing product C. A imports product C from Canada. B imports product C from France. If B has any grievances over product C in reference to antidumping or countervailing duties, he will be able to seek redress for his grievances in the Court of International Trade simply because he imported product C from France. Since A imported product C from Canada, A will be precluded from asserting any similar claims in the Court of International Trade. Except for the origin of where they import product C from, A and B should be considered similarly situated.

22. See, e.g., Certain Fresh Cut Flowers from Canada, Chile, Columbia, Costa Rica, Ecuador, Israel, and the Netherlands, USITC Pub. 1956 (March 1987), at 15-20 (Imports of like flowers from all investigated countries cumulated); Certain Brass Sheet and Strip from Brazil, Canada and the Republic of Korea, USITC Pub. 1930 (Dec. 1986) at 12 (Imports from Canada, Brazil, France, Italy, S. Korea, Sweden, and West Germany cumulated); Oil Country Tubular Goods from Canada and Taiwan, USITC Pub. 1865 (June 1986) at 8 (Imports of OCTG from Canada cumulated with OCTG from Israel in the CVD case, and with Israel and Taiwan in the antidumping case); Iron Construction Castings from Canada, USITC Pub. 1811 (Feb. 1986) (Imports from Canada cumulated with those from Brazil, India, and the People's Republic of China).

of which have been implied into the guarantees of the Due Process Clause of the Fifth Amendment.[23]

III. What is Being "Protected" From Judicial Review Are Private Acts Not State Action.

A number of commentators in support of the FTA speak of the right of the President to conduct our foreign relations and of Congress to regulate foreign commerce and seek to clothe the deprivation of judicial review with these undeniable Executive and Legislative powers. But a close examination of the protection afforded by our dumping and countervailing duty laws is not protection from foreign states but protection from unfair competition by foreign exporters who sell their products to the United States at less than fair market value (i.e., the price at which the merchandise is sold in the home market) and are thus dumping their merchandise in the United States to the injury of American manufacturers, producers or wholesalers; or from foreign exporters who avail themselves of subsidies by their Government of a kind which are contrary to the Subsidies Agreement in the GATT and are injuring American manufacturers, producers or wholesalers, or, similarly in dumping cases, hindering the establishment of such American companies.[24] A dumping finding is directed at companies not countries! A countervailing duty investigation initially involves inquiries of a country as to the laws complained of, their general application, and the utilization of any suspect subsidies by particular exporters, but thereafter it is a question of whether and how much an exporter has availed itself of the subsidies.

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23. See Weinberger v. Wiesenfeld, 420 U.S. 636, 43 L.Ed. 2d 514 (1975) holding that the gender-based distinctions provided for by 42 USC §402(g) of the Social Security Act, which afforded less protection for the survival of female wage earners than for male wage earners, violate the right to equal protection of the laws under the due process clause of the Fifth Amendment.

24. See 19 U.S.C.A. 1671-1677.

Thus, there is no basis for contending that the binational dispute settlement panel can be defended on the ground of national sovereign interests. While it may be that Canada doesn't like our dumping and countervailing duty laws[25] to be applied to their products, until and unless those statutes are repealed they are a part of our national policy and are enforced on a case by case basis against imported merchandise whose exporters or manufacturers sell at dumped prices or at prices made uncompetitive because they have taken advantage of certain subsidies.

Certainly an importer or exporter should have the opportunity to show that there was no dumping under our laws or that his supplier was not dumping, or that the computation of the margin was arrived at not according to the statute. The failure to be able to do so leaves an importer without the ability to seek the judicial remedy historically available to him to contest what he believes to be an illegal exaction of duties. Likewise, the American petitioner should be able to show that a negative determination as to sales at less than fair market value or on injury was contrary to the statute.

IV. <u>There is No Precedent for A Binational Panel Depriving A Citizen of a Suit Against the United States In The Application of Domestic Legislation</u>

The proposed Binational Disputes Settlement Panel in the Canada-United States FTA is not only without precedent but is an effort to lessen the right of judicial review in the Customs area at the least, if not elsewhere. Even those who most desire the FTA (and this Association is not opposed to a free trade agreement with Canada), are concerned with the danger inherent in the adoption of such a device. For example, the International Trade Policy and the International Investment Committees of the National Association of Manufacturers in a Statement adopted on November 18, 1987, said "...NAM is concerned, as a matter of principle, about the adverse effect that the

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25. Although it has similar domestic legislation.

binational panels of the AD/CVD dispute settlement mechanism will have on U.S. sovereignty, on the administration of U.S. trade law and on the ability of U.S. petitioners to secure judicial review. We accept the proposal for these panels in the context of the Canadian agreement, but we would oppose extending the use of such panels or similar techniques to other trade agreements."

Frankly, we believe this right to judicial review, which was so easily and unnecessarily bargained away, is so essential a right that Congress should make it clear that its approval of the FTA is conditioned on the elimination of Chapter 19.[26]

Some proponents of the provision for the binational panel point to international claims and boundary commissions as precedent for the proposed action here. There is no legal or factual basis to that contention. Obtaining a fund from a foreign government to settle claims of our citizens against that government without recourse to our courts, as in Dames & Moore v. Regan, 453 U.S. 654 (1981), is not analogous to depriving an importer of the right to challenge an assessment of dumping or countervailing duties in our courts.[27] Under the doctrine of sovereign immunity, our courts have no power to

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26. It would seem that a possible alternative to the binational panel is a statutory preference for these cases setting out time limitations for hearing and decision in the CIT (after the filing of the administrative record) and in the appellate tribunals. Another possibility is the voluntary utilization of the panels on the agreement of all parties to it and to be bound by the panel's decision.

27. Dames & Moore v. Regan, 453 U.S. 654 (1981), involved an international tribunal established by the President to settle claims against the Iranian Government arising out of the hostage crisis. But that case is demonstrably inapposite here because it ultimately turned in substantial measure on the President's power to conduct foreign affairs. Thus, the Court quoted Judge Learned Hand from Ozanic v. United States, 188 F.2d 228, 231 (C.A.2, 1951), where Judge Hand had stated:

> The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies.

The Court further stressed that the President's settlement procedure:

> [was] determined [by the President] to be a necessary incident

grant relief in suits of our citizens against foreign governments. Even where there are assets of that government in the United States, they may not be attached unless they are a part of commercial activity not related to governmental functions and a claim of immunity is not recognized by the State Department or by the Courts.[28] Claims commissions are established to allocate amoung claimants a fund received from a foreign government.

The Foreign Claims Settlement Commission is also not a precedent because the Commission was disposing of, pursuant to international law, claims by U.S. citizens against former foreign (enemy) Government action which, if proven, were paid out of assets of the foreign Government. There have been numerous binational claims commissions in our history[29] but not one of them was depriving U.S. citizens from obtaining judicial review in instances where the U.S. Government was seeking to collect additional duties. Those were cases where our Government sought to assist our citizens

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(cont.)

to the resolution of a major foreign policy dispute ***.

The persistent theme of foreign affairs goes to the core of the holding in the case. The fact that the Court did not say this emphatically but engaged in an extensive analysis of statutes cannot detract from this conclusion.

Finally, Dames & Moore was decided on the narrowest of grounds, which is something the Court took pains to point out. See 453 U.S. at 660 and 688. This means that the case is unable to provide any sort of constitutional underpinning for an unprecedented institution like the U.S.-Canadian binational panel. Having to rely on Dames & Moore reveals the weakness of the proponents' position

28. See Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 48 L.Ed. 2d 301, 96 S.Ct. 1854 (1976), and cases cited therein; See also National City Bank v. Republic of China, 348 U.S. 356, 99 L.Ed. 389, 75 S.Ct. 423, reh'g. denied, 349 U.S. 913, 75 S.Ct. 598, 99 L.Ed. 1247 (1955).

29. American-Mexican, American-Turkish are but two examples.

in realizing their claims against foreign governments, claims which without our intervention might never have been honored.[30]

Likewise, the settlement of boundary disputes between nations by a binational Boundary Commission or the International Court of Justice is again not analogous. Such disputes are patently between nations and handled diplomatically or in international fora.

We are not aware of any precedent where the United States has statutorily agreed to force its citizens or those entitled to the protection of its laws to go to a binational panel to construe United States laws and Federal agencies' actions with the ultimate determination of those rights or obligations under United States statutes in that binational panel.[31]

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30. One proponent has also cited Berman v. Parker, 348 U.S. 26 (1954), the case involving the District of Columbia Redevelopment Act of 1945, 60 Stat. 790. According to that proponent, the Redevelopment Act involved a Congressional delegation of legislative power to a "private group," namely, the District of Columbia Redevelopment Land Agency. But the citation and argument are difficult to understand because the facts do not support the contention being made. As a careful review of the Act itself will reveal, the Redevelopment Land Agency was established by statute (see section 4) and funded by public funds (see section 16(b)). Moreover, two of its five members were appointed by the President, and the remaining three by the Board of Commissioners of the District of Columbia, with all appointments made subject to confirmation by the Senate (see section 4). Clearly, this was not a mere "private group", as the proponent of the panel would have one believe. Moreover, the Berman case is particularly inapposite because Congress has a special responsibility in the governing of the District of Columbia. Berman has obviously been cited inappropriately and does nothing to justify the bi-national panel — an institution which, incidentally, is not even remotely comparable to the Redevelopment Agency.

31. In fairness, it can be noted that an example exists of a narrow delegation of legislative power to a Tribe of American Indians. See United States v. Mazurie, 419 U.S. 544 (1975). The power delegated was the power to regulate the flow of liquour into Indian country. However, the delegation involved in Mazurie bears no resemblance to the binational panel, either on the facts or in fundamental footing. As for the latter, Congress and the American Indian Tribes have a highly complicated and exceptional relationship which is surely unique in American affairs. Canada is not in a comparable position; nor is a panel of private individuals established pursuant to an international agreement.

V. The Panel Cannot be Justified on Inherent Executive Powers

Finally, the panel cannot be justified on any power inherent in the Executive. Unlike the power to conduct foreign affairs, the power to impose customs duties and to regulate international trade is vested solely and squarely in Congress. See Article I, section 8. Accordingly, the Constitution provides no basis for the Executive to establish on its own an international institution empowered to exercise authority in those fields. To the contrary, the Executive can act in those areas only pursuant to a proper delegation of legislative power. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) ("The Steel Seizure Case"). It has already been demostrated in the discussions above that Congress cannot delegate legislative power to a delegatee like the binational panel; at the same time, the Executive cannot enter into international agreements that change the character of the United States Government. Accordingly, the binational panel cannot be justified under the Executive's powers under Article II.

CONCLUSION

The United States is being asked to turn a new corner, to travel down a new road but we do not think it should because of the barrier to that travel in the Constitutional guarantees of due process, equal protection and access to our courts. It is also bad policy and full of risks for the future.

The Customs and International Trade Bar Association, while recognizing that the Final Text permits non-governmental parties to be represented at binational panel proceedings and to force matters to be heard by those panels, and is thus an improvement over the prior version, finds that the denial of the right to judicial review in United States courts by an aggrieved party, if either the United States or Canada desires to

refer the matter to the binational panel, is repugnant to both the Constitution and to our national experience.

Respectfully submitted,

THE CUSTOMS AND INTERNATIONAL TRADE
BAR ASSOCIATION

By: _____

Andrew P. Vance
Chairman, Trial and Appellate
Practice Committee

March 8, 1988

Senator HEFLIN. Mr. Baker. By the way, all the written prepared statements will be entered into the record in full, and if you can summarize in 5 minutes, we would appreciate that.

Mr. BAKER. In reliance on that, I will.

My name is Stewart Baker. I am here with Jeff Bialos on behalf of the ABA. Our basic position is first, that these dispute resolution provisions are constitutional; but second, that the implementing legislation should be crafted in a way that guarantees impartiality and independence for those panels.

The first constitutional question—there are two—is whether this proposal is consistent with article III. I am not going to discuss that at great length. It has been covered, I think, fully in the materials that have already been submitted.

Very briefly, I will say that when we looked at it, we concluded that the one serious constitutional question about taking these cases out of the courts and putting them before panels was the possibility that constitutional decisions would be rendered by the panels and that the courts would be unable to rule on claims that the agencies had acted unconstitutionally.

There is a good deal of scholarly thought and a fair amount of judicial precedent that suggests that that would not be constitutional.

We recommended to the administration, and the administration has adopted that recommendation, that it leave all constitutional questions before the courts, and so anyone who feels the Government is acting unconstitutionally can take the Government to court and get an article III court's decision.

The administration's responsible resolution of that constitutional issue is not matched by the way they have chosen to deal with the second constitutional question. That constitutional question arises under the Appointments Clause. Under the Appointments Clause, the President must appoint—with a few exceptions that aren't relevant here—all "Officers of the United States."

There are two or three recent cases that define "Officers of the United States" in the context of fights between Congress and the Executive over who is going to control a particular agency or activity, and in that context the courts have given a broad reading to the Appointments Clause. Anyone who exercises "significant authority under Federal law" is deemed an officer of the United States in the context of those disputes.

What the Office of Legal Counsel and the Department of Justice have done is to take that test and carry it over to an area where it has no real application.

First, this is not a separation of powers dispute. Congress is not planning to appoint any panelists. The President will name the United States panelists; Canada will name Canada's panelists.

The very fact that Congress is not seeking to expand its authority will allow the courts to view this issue differently than the previous cases to come before the Supreme Court.

The second and equally important distinction between this and previous cases is that we are talking about international arbitration. The United States has been engaged in binding international arbitration for 200 years. It has never insisted on appointing the other side's arbitrators. And it has never suggested that there is a

constitutional problem with being bound by those arbitral decisions.

The constitutional problem that the Department of Justice sees here is an afterthought, and it is about 200 years too late.

I feel strongly about this because the Justice Department's misreading of the Appointments Clause has led it to propose a radical and troubling solution, one which I heard Mr. McGinnis describe several times today as simple and straightforward, a minor drafting issue.

Well, like Mr. Vance, I am a private practitioner; I have to represent real clients in real cases. And I don't think that the Justice Department has proposed anything like simple, straightforward, or a minor drafting error. Justice has added a step to a process which used to end with the decision of a neutral panel of impartial arbitrators bound by law. Instead of ending there, under the Justice Department proposal, cases will end on the President's desk, and he will decide, based on diplomatic and political considerations, how to resolve every single antidumping and countervailing duty case involving Canada.

That is a very substantial difference. That is a real retreat from the rule of law in these cases.

Indeed, I thought I heard Mr. McGinnis say, when he was pressed about how to protect against abuses, that political realities will prevent the President from violating international law, and that diplomatic considerations will prevent the President from violating the Free Trade Agreement.

That may well be the case when Canadians win these cases, but sooner or later, if these panels operate according to law, private U.S. litigants will win a case overturning a U.S. Government decision in favor of Canada. Both governments will be unhappy with that panel decision. I have no reason to think that the Canadian government would see it as a breach of international law if the President chose to use the discretion that Justice would confer on him—the unreviewable discretion—to overturn that panel decision and leave the private U.S. party out in the cold despite his legal victory.

I would urge, therefore, that the Justice Department proposal be rejected. I don't think it is necessary. In fact, there are numerous cases in which other persons have given orders to Federal agencies without having to be appointed by the President. The rulings of the binational panel should go straight to the Commerce Department and the International Trade Commission. As long as this committee and the legislation make it clear that the authority of the panel derives from international as well as Federal law that should solve any constitutional problem in this area.

Now, the last point that we would like to address are some of the implementing details that are necessary to make sure that the panels operate in a manner that is impartial and fair. And for that discussion, I'd like to turn the microphone over to Mr. Bialos.

Mr. BIALOS. Thank you.

Just as a preliminary matter, I have a couple of observations on things already said.

First, concerning the administration proposal that the President implement the binational panel decisions, I just want to note that,

in my view, this approach is contrary to the evolution of United States unfair trade law over the last decade or so. Congress has acted in fact to remove executive branch discretion in these cases precisely in order to insulate these cases from political interference.

So what the administration is doing here—and I second Mr. Baker's point—is in sharp contrast to that.

Second, I might add that the support for the constitutionality of the binational panel mechanisms can be drawn from a number of recent Supreme Court cases that reflect an attitude favoring the use of alternative dispute resolution methods, particularly in the international context. Wholly apart from the practice of international arbitration, you see the Court upholding in *Mitsubishi Motors* and in *Sherk* v. *Alberto Culver* the arbitration of international securities and antitrust disputes.

But let me cut to what I'd like to focus on this morning, and that is the implication of the agreement, particularly the antidumping and countervailing duty provisions, for litigants in these cases.

The constitutional issue here, which Mr. Lowenfeld ably addressed, and I am not going to repeat, is the due process issue. In view of the section, we do not believe that the fifth amendment requires that courts handle these questions as a matter of due process, except of course with respect to constitutional issues.

As a number of cases dealing with these non-constitutional issues indicate, due process doesn't require judicial process. And when you look at the processes here, what you find is that there are a variety of safeguards at the administrative level and in the FTA that provide ample process, that provide a fair opportunity to be heard before an impartial tribunal, and that provide a check on what the agencies have done in this area.

Let me add as a former clerk on the Federal circuit, the highest appeals court that deals with trade cases, it is my view that the panel could ably do what the courts have ably done in this area over the last number of years.

There are, however—and this is what I would like to briefly focus on—a number of areas where the FTA and the proposed implementing legislation do not address certain kinds of issues and certain kinds of problems.

First, it is vitally important that there be impartial panel selection procedures in order to ensure effective and unbiased review of final AD/CDV decisions. Ensuring the integrity of this process is essential to the legitimacy of the entire mechanism. Yet there are a few rules here. While the FTA has some guidelines, it does not say who is going to select panelists and does not provide much concrete guidance.

Further, the Administration's proposals, while constructive, don't seem to go far enough in this area. The Administration does not recommend legislation, and leaves the procedures to an interagency group that would be administered as the administration chooses.

The ABA believes that legislation is necessary in the area of selecting the panelists. Without it, what you would find is that under an ad hoc approach, the next administration would be able to derogate from whatever procedures are set up in this area.

One possible legislative approach in this area is for Congress to require the Senate confirmation of panelists. The ABA doesn't have a position on this. My personal view, however, is that the involvement of Congress in the confirmation of the roster of panelists may serve as a check on the administrations decisions and help to ensure the impartiality of the selection process.

I have trouble with the notion that adding such a role for Congress would somehow "politicize" the process. In my view, whenever the executive branch decides to appoint anyone, regardless of what level, it already is inherently political. I think that adding a role for Congress will just serve as a check on that.

Another important area I think Congress should address is to protect the role of private litigants in the selection process to make it impartial. The FTA also doesn't specify any role for private litigants. The administration says it will consult private litigants in selecting the panelists.

Well, there are certain circumstances where this may not be enough. Imagine a situation, for example, where a domestic party seeks to challenge a final administrative decision in an AD or CDV case. In these circumstances, the interest of the domestic litigant would be adverse to both the United States and to Canada, which normally would be aligned with the importing interest. Yet under the FTA and the proposed implementing legislation, it is Canada and the United States that would together select the panel in such circumstances.

I don't know that consultations are going to be enough here. It seems to me that Congress should consider other approaches for protecting the interests of such litigants. One approach, for example, might be to have some neutral third party, for example, a panel of Federal circuit judges, select the panelists in these situations.

Another significant issue, which Mr. Vance alluded to, concerns the review of final antidumping and countervailing duty determinations in multi-country or cumulated investigations. This, too, is a potential problem area not addressed by the FTA. Since imports from two or more countries must be cumulated now in most cases, the majority of U.S. trade cases are brought on a cumulated basis, and where Canadian goods are included, this means that the final agency action goes to the panel with respect to imports from Canada, and with respect to imports from other nations, it goes to the courts.

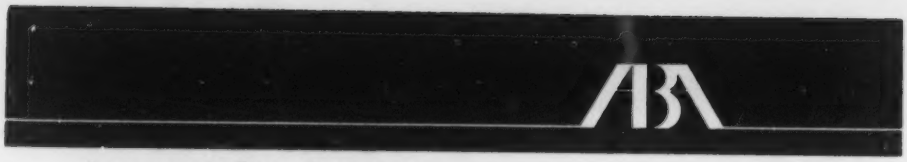
This conflict might lead to inconsistent trade policy against different countries. Significantly, I note here that the administration proposal that the President implement binational panel rulings perhaps inadvertently might afford him the discretion to resolve the conflict by holding the panel decision in abeyance until the Court of International Trade has ruled. Then the President would be able to, at that point, directly address the conflict, and there might even be some kind of negotiated solution involving Canada.

It seems in my view that this would give the administration unwarranted discretion in an area where, as I have noted at the outset, Congress has increasingly moved toward the application of the rule of law and the removal of political influences.

There also are a number of other issues not addressed by the FTA. In the interest of time, however, Senator, I will not address them. They are dealt with in detail in our report.

Thank you very much.

[The statement follows:]



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STATEMENT OF

Stewart Abercrombie Baker and Jeffrey Philip Bialos

on Behalf of
AMERICAN BAR ASSOCIATION

Before the
Committee on the Judiciary
United States Senate

Concerning the
Dispute Resolution Mechanisms Under the
United States - Canada Free Trade Agreement

May 20, 1988

Mr. Chairman and Committee Members:

My name is Stewart Baker. Testifying with me today is Jeffrey Bialos. We are here on behalf of the American Bar Association. The ABA's Section on International Law and Practice asked us in January of this year to form a task force to analyze the constitutional and other issues raised by the dispute resolution provisions of the Canada-United States Free Trade Agreement. Our testimony today is an outgrowth of the task force's report.

The ABA has long taken an active interest in provisions for peaceful dispute settlement between the United States and Canada. In August 1979, the House of Delegates of the ABA adopted by voice vote a resolution commending to the attention of the United States Government a draft treaty on settlement of disputes between the United States and Canada. More recently, in June 1987, the ABA's Board of Governors unanimously adopted a resolution making recommendations with respect to the settlement of disputes under the Free Trade Agreement then being negotiated between the two countries.

In the months since then, an agreement has been negotiated between Canada and the United States. The ABA has continued its active interest in the proposals for resolution of disputes arising under the Free Trade Agreement. The release in

December 1987 of the full text of the Agreement made possible a more detailed study of the dispute resolution provisions and the appropriate steps to be taken in implementing these provisions.

This study, performed by the task force described above, led to the conclusion that the binational panel mechanism for review of antidumping and countervailing duty cases is consistent with the United States Constitution and that the implementing legislation, which can put to rest any constitutional questions, should be approved promptly. The task force further concluded that the implementing legislation (or binational procedural rules) should address several procedural issues left open by the FTA, including the method of selecting panelists, the code of conduct for panelists, and procedures in cases involving imports from Canada and other countries.

Our testimony today summarizes the findings of this study, which is attached, and addresses questions raised by the draft implementing legislation now under consideration.

Mr. Chairman, we thank you for your attention. We will be pleased to answer any questions that you or other Committee members may have.

I.

EXECUTIVE SUMMARY

In the recently-negotiated Canada-United States Free Trade Agreement (the "FTA"), the United States and Canada have established a binational mechanism for the review of final antidumping ("AD") and countervailing duty ("CVD") determinations made by national investigating authorities. For the reasons set forth herein, the Section concludes that:

(1) The binational panel mechanism is consistent with the United States constitution and should be approved;

(2) The necessary implementing legislation, which can put to rest any constitutional questions about binational panels, should be adopted promptly. The implementing legislation, binational procedural rules, or code of conduct for panelists should address several procedural issues left open by the FTA, including the method of selecting panelists, the rules of conduct for panelists, and procedures in cases involving imports from both Canada and other countries.

The centerpiece of the FTA framework for AD/CVD matters is the binational dispute settlement panel, which would, on a case-by-case basis, review final AD/CVD determinations made by U.S. and Canadian investigating authorities. Decisions of FTA panels are binding on the United States and Canada; where binational review is requested by an FTA party, it would substitute for judicial review under domestic law.

The FTA also establishes two other important mechanisms in the AD/CVD area. First, it affords the United States and Canada the right to request an independent panel review of proposed amendments to AD/CVD law, and empowers the statutory review panel to determine whether such amendments are consistent with the General Agreement on Tariffs and Trade and the purposes of the FTA. Second, the FTA creates a binational Working Group and empowers it to develop, and recommend to the Parties, a set of alternative rules to current AD/CVD laws, which could replace the binational panel review mechanism in 5-7 years.

On the basis of a review of the FTA's AD/CVD dispute resolution mechanism and pertinent legal authorities,

the Section has the following views and recommendations, which are set forth in detail below:

(1) On close analysis, it would appear that any constitutional concerns over the FTA's binational panel review mechanism can be resolved by responsible implementing legislation.

As a threshold matter, it must be recognized that the FTA stands on strong constitutional ground. The FTA provisions at issue were negotiated by the President pursuant to a delegation of authority from Congress and will soon be implemented through legislation. It therefore is highly likely that a reviewing court would uphold this exercise of the pooled authority of Congress (over foreign commerce) and the President (to negotiate international agreements that affect the claims of U.S. nationals).

Within this context, two specific constitutional objections to the binational panel must be addressed.

(a) The applicable precedents demonstrate that Congress does, in fact, have the authority to substitute binational panel review for judicial review of AD/CVD questions. Article III of the Constitution affords Congress the authority to make exceptions to the Supreme Court's appellate review, and to limit the jurisdiction of such lower courts as it creates. Although recent rulings appear to limit the power of Congress to restrict the jurisdiction of the federal courts, these limitations are inapposite. Specifically:

- This is not a case involving the removal of judicial review over constitutional claims. The FTA does not unambiguously remove appellate jurisdiction over constitutional claims that arise in AD/CVD cases, and it should not be read to do so. In its implementing legislation, Congress should confirm this interpretation of the FTA and thereby alleviate any uncertainty in this regard.

- Statutory AD/CVD questions are not the types of disputes that are the exclusive province of Article III

courts. AD/CVD cases are classic "public rights" controversies that can properly be heard in alternative forums.

(b) Nor does the method for selecting panel members give rise to infirmities under the appointments clause of the U.S. Constitution. Concerns of this nature have been raised on the basis of the Supreme Court's ruling in Buckley v. Valeo, 424 U.S. (1976), which held that Federal Election Commission ("FEC") decisions were not binding under U.S. law because all of the FEC Commissioners were not appointed by the President. However, the Buckley ruling should not apply where, as here, the binational panel derives its authority from international as well as domestic law. The legality of the FTA method of selecting panel members also is confirmed by the longstanding and unchallenged U.S. diplomatic practice of establishing panels for the settlement of international disputes that include some members not appointed by the President.

(2) The substitution of binational panel review for judicial review does not raise due process concerns. In this regard, the FTA establishes a number of procedures for binational panel review that will facilitate effective, orderly, and impartial review of final AD/CVD proceedings. Specifically:

- The FTA affords private litigants the right to challenge final AD/CVD determinations before panels, including the right to appear before the panel, make oral arguments, and provide written submissions.

- FTA panels cannot develop supranational law; they are bound to apply domestic AD/CVD law and review standards, and they must base their review on the administrative record.

- Additional safeguards against political influence and bias include:

  -- general guidelines for the selection of the roster from

which panel members normally will be chosen;

-- a code of conduct for panelists;

-- a requirement that panel members not be affiliated with, or take instructions from, the two governments;

-- peremptory challenges to panel members; and

-- a procedure for extraordinary challenges to FTA panel decisions on grounds of bias, manifest disregard for domestic law, or acts in excess of the panel's authority.

At the same time, the FTA raises a number of procedural issues with respect to the binational panel review of AD/CVD cases. Legislation and other actions implementing binational panel review should build on the FTA's procedures to add further safeguards for orderly and fair proceedings. In particular:

o Serious efforts must be made to address the numerous problems that could arise from simultaneous judicial and panel review of AD/CVD decisions involving both Canada and other countries. Inconsistent rulings in such cases would create costly and disorderly conflicts in the disposition of cases (see p. 41).

o The person(s) selecting the members of the roster and the individual panels must be impartial if the procedure is to be free of either real or perceived political influence. Consideration also should be given to affording private parties an opportunity to consult on the

U.S. Government's choice of candidates for the roster of potential panelists (see p. 40).

- The precedential value of panel decisions should be made clear. In the absence of intervening changes in the law, panel decisions should be binding on later panels applying the same law. And the courts of each country should be free to draw on such decisions to the extent that they are persuasive (see pp. 49-40).

II.

THE GENESIS OF THE FTA'S BINATIONAL PANEL REVIEW MECHANISM

A. The Application Of Domestic AD/CVD Rules Has Caused Bilateral Frictions In U.S.-Canada Relations

In recent years, the United States and Canada have engaged in a number of contentious disputes over international trade issues, including the application of domestic AD/CVD laws to bilateral trade. Although the AD/CVD laws of the United States and Canada are similar, their administration nevertheless has caused significant bilateral frictions.

The controversy over the recent U.S. CVD investigation concerning softwood lumber highlights the nature of the bilateral disputes in this area. In 1986, the Commerce Department determined, on a preliminary basis, that certain stumpage programs established by the Canadian provinces conferred countervailable subsidies on Canadian lumber producers.[1] The finding was especially contentious because it reversed a decision by Commerce three years earlier, that such programs did not, in fact, confer dutiable subsidies. The case also raised Canadian concerns that many of its various regional development and social welfare programs will be considered countervailable subsidies under U.S. law and lead to high additional duties.[2] At the same time, domestic interests in the United States expressed

1. 51 Fed. Reg. 37,453 (1986).

2. Canada's regional policies include low interest loans, tax incentives and equalization payments.

concern that such Canadian policies and programs conferred unfair benefits which hampered U.S. competitiveness, and should be addressed through the vigorous enforcement of U.S. CVD rules.[3]

Although the case was settled after the Canadian Government agreed to collect export taxes on shipments of softwood lumber bound for the United States,[4] it nevertheless heightened Canadian concern over the unpredictability of U.S. AD/CVD determinations and the prospect that domestic political pressures were being brought to bear on such proceedings. As U.S. Trade Representative Clayton Yeutter explained to Congress in 1986, "[t]here is a perception in Canada that our countervailing duty and antidumping laws unfairly harass import competition. While I disagree with this view, the Canadians clearly believe that they should be entitled to a more predictable market in the United States."[5]

B. A Broad Range Of Alternative Mechanisms To Ameliorate U.S.-Canadian Frictions Over AD/CVD Cases Have Been Debated

As a consequence of such bilateral disputes, the application of AD/CVD rules became a major issue in U.S.-Canadian negotiations over the FTA. During the course of these long and arduous discussions and the accompanying

3. See, e.g., Negotiation of United States - Canada Free Trade Agreement, Hearing Before the Committee on Finance, United States Senate, 99th Cong., 2d Sess. (April 11, 1986) (Statement of Sen. George J. Mitchell) ("[P]otato growers in New Brunswick and Prince Edward Island receive far more government assistance than those in Maine. This subsidized competition is crippling our already depressed industry, and is not fair trade. . . . Maine fishermen are also victims of unfair competition in the form of Canadian subsidies. . . ."); (Statement of Stanley S. Dennison, Chairman, Coalition for Fair Lumber Imports) ("The primary reason for the problems faced by the U.S. lumber industry is the flood of subsidized Canadian lumber into the United States. . . .).

4. 52 Fed. Reg. 315 (1987).

5. Negotiation Of United States-Canada Free-Trade Agreement, Hearing Before the Committee On Finance, U.S. Senate, 99th Cong., 2d Sess. at 41 (1986) (Statement of Ambassador Clayton Yeutter, United States Trade Representative).

public debate, a broad range of options for ameliorating the bilateral frictions arising from the application of AD/CVD rules were considered.[6]

Some argued the United States and Canada should completely eliminate AD and CVD actions against one another as part of their agreement to establish a free trade area. Other approaches included the development of a set of binational rules on acceptable subsidies and pricing practices, and the creation of a binational commission to administer the new rules. Also proposed were binational mechanisms, similar to those eventually adopted, that would review national decisions in AD/CVD cases. Such mechanisms would allow both the United States and Canada to retain their right to vigorously protect the markets from unfair practices, but at the same time subject these national decisions to binational oversight and discipline.

In the course of this debate, the American and Canadian Bar Associations jointly recommended that any free trade agreement entered into between Canada and the United States should include an effective framework for the settlement of disputes over bilateral trade issues that arise thereunder.[7] The dispute settlement procedures ultimately established by the FTA draw upon the recommendations of the Working Group appointed by the two bar associations as well as proposals advanced by others. At the same time, however, the FTA also departs from these proposals in numerous respects.

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6. For a thorough review of the various options in the AD/CVD area, see P. Wonnacott, The United States and Canada: The Quest for Free Trade (Institute for International Economics; March 1987).

7. For the details of these recommendations, see American Bar Association Resolution on "Settlement of Disputes Under the Proposed Free Trade Area Agreement," and Report thereon, approved by the Board of Governors, American Bar Association (June 1987).

III.

THE BASIC FEATURES OF FTA BINATIONAL PANEL REVIEW OF AD/CVD CASES

The FTA establishes a novel and multi-faceted dispute resolution mechanism with respect to AD/CVD issues. Specifically, the FTA mandates: (1) binational panels for the review of final AD/CVD determinations by administrative agencies in the United States and Canada; (2) binational panels for the review of changes in each nation's AD/CVD laws; and (3) a Working Group empowered to develop an alternative set of rules to replace current AD/CVD laws and the binational panel mechanism in five to seven years time. As set forth in the FTA, the purpose of these procedures is "to establish fair and predictable conditions for the progressive liberalization of trade between the two countries while maintaining effective disciplines on unfair trade practices." FTA, Art. 1902(2)(d)(ii).

Binational Panel Review. A principal feature of the FTA's AD/CVD mechanism is the binational dispute settlement panel, which would, for a period of 5-7 years, replace judicial review of AD/CVD determinations in both nations. FTA, Art. 1904(1).

Under the FTA, the investigating authorities of the United States and Canada retain the right to apply domestic AD/CVD laws within their respective jurisdictions. FTA, Art. 1903(1). At the same time, however, upon the request of either FTA party, a binational panel will review "final" antidumping and countervailing duty determinations in the United States and Canada,[8] and determine whether the agency

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8. For U.S. investigations, "final" determinations include not only final decisions of Commerce and the ITC in initial investigations, but final administrative determinations in annual reviews conducted under existing AD/CVD orders, determinations not to review an AD/CVD order based on changed circumstances, and a determination whether a particular type of merchandise is within the order. FTA, Art. 1904(2) & 1911. The Canadian decisions within the meaning of "final" determinations are set forth in FTA, Art. 1911.

Under the FTA, judicial review still is available for other national AD/CVD determinations involving imports from Canada or the United States, such as decisions not to

(footnote continued)

decision was made in accordance with the domestic law of the importing country. The panel, in conducting its review, must apply the standard of review and general legal principles of the importing country whose AD/CVD decision is being reviewed.[9] FTA, Art. 1904(3). Significantly, the decisions of the panel are to be binding upon the United States and Canada. FTA, Art. 1904(9). Upon rendering its decision, the panel would have the authority either to uphold the agency decision or to remand the case to the appropriate investigating authority for action not inconsistent with the findings of the panel.[10]

The binational panels will be composed of five members, normally selected on a case-by-case basis from a roster developed by the two countries pursuant to guidelines set forth in the FTA. See FTA, Annex 1901.2. Each country is to select two members of the panel, with the fifth member chosen by agreement. If the countries are unable to agree, the fifth member is chosen by the other panelists; if the panelists are unable to agree, the fifth member is to be chosen by lot from the roster. Peremptory challenges are to be permitted.

The United States and Canada also have agreed to adopt rules of procedure for the binational panels, on the basis of judicial rules of appellate procedure, where appropriate, by no later than January 1, 1989. FTA, 1904(14). The FTA provides that these rules must require service of process, afford litigants at least one hearing before the panel, and allow litigants the opportunity for written submissions. FTA, Art. 1904(14) As discussed in detail in Section IV(B), infra, strict deadlines also are established for panel review of AD/CVD cases.

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initiate an investigation and preliminary ITC determinations. See 19 U.S.C. § 1516a.

9. As used in the FTA, the term "general legal principles" refers to "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." FTA, Art. 1911.

10. The time permitted for the remand would be determined by the complexity of the order on remand, but may not exceed the time permitted for the original decision. The remand decision would be subject to review by the same binational panel. FTA, Art. 1904(8).

The Review of AD/CVD Amendments. Under the FTA, the United States and Canada reserve the right to "change or modify" their AD/CVD laws subject to certain conditions set forth therein. FTA, Art. 1902(2). First, AD/CVD amendments only shall apply to goods from the other Party to the FTA where "such application is specified in the amending statute." Id. Second, the amending Party must provide written notice of the amending statute to the other Party "as far in advance as possible of the date of enactment." Third, following such notification, the amending Party must, upon request of the other Party, enter into consultations prior to enactment of the amendment. Finally, such amendments must, as applicable to the other FTA Party, be consistent with: (a) the General Agreement on Tariffs and Trade (the "GATT")[11] and the GATT Subsidies and Antidumping Codes[12]; and (b) the specified purposes of the FTA. FTA, Art. 101 & Art. 1902(d)(ii).

Significantly, the FTA affords the Parties the right to request the convening of a binational panel, which would determine whether the amendment is consistent with the GATT, the FTA, or the decisions of a binational dispute settlement panel thereunder. FTA, Art. 1903. In the event that the panel recommends modifications to an AD/CVD amendment in order to remedy a nonconformity with GATT or the FTA, the parties are required to begin 90-day consultations to arrive at a mutually satisfactory solution to the matter. However, if no such agreement is reached and remedial legislation is not enacted within 9 months after the 90-day consultation period ends, the party requesting the panel may: (1) take comparable legislative or equivalent executive action; or (2) terminate the FTA upon 60-day written notice. FTA, Art. 1903(b).

The Development of Substitute AD/CVD Rules. As noted above, the FTA panel review of final AD/CVD determinations is an interim mechanism, which will be in

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11. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pt. 5,6, T.I.A.S. No. 1700, 55 U.N.T.S. 194, reprinted in 4 Basic Instruments and Selected Documents (1969).

12. See Agreement on Interpretation and Application of Articles VI, XVI and XVII of the General Agreement on Tariffs and Trade ("Subsidies Code"), and Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("Antidumping Code").

effect for five years "pending the development of a substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade." FTA, Art. 1906. In this regard, the FTA creates a Working Group empowered to develop, and recommend to the FTA Parties, such an alternative AD/CVD regime, and instructs it to develop "more effective rules and disciplines" concerning subsidies, and a substitute system for dealing with unfair pricing and government subsidization. The Working Group also must consider any problems associated with the binational panels convened under the FTA.

The Parties are required to use "best efforts" to develop and implement the substitute AD/CVD rules within the five year time period. FTA, Art. 1907(2). In the event that a new regime is not "agreed and implemented" at that time, however, the binational dispute mechanism for AD/CVD cases is automatically extended for an additional two years. FTA, Art. 1906. The failure of the Parties to agree to and implement new AD/CVD rules within the two-year extension allows either Party to terminate the FTA upon six months notice. Id.

IV.

ANALYSIS

A. Constitutional Issues

The authority of the President to negotiate the FTA, and of Congress to pass implementing legislation, stands on strong constitutional ground. Article I of the Constitution affords Congress plenary authority over foreign commerce,[13] which it traditionally has relied upon in authorizing the President to negotiate trade agreements.[14]

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13. U.S. Const., art. I, § 8, cls. 1, 3. See also Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 448-51 (1979); Weber v. Freed, 239 U.S. 325, 329 (1951) (This delegation establishes "the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles. . . .").

14. See, e.g., Trade Agreements Extension Act of 1954; Chp. 445, P.L. 464, reprinted in 1954 U.S. Code, Cong. & Adm. News 421, Trade Expansion Act of 1962, P.L. 87-794, reprinted in 1962 U.S. Code, Cong. & Adm. News at 1022; Trade Act of 1974, (footnote continued)

Pursuant to its foreign commerce authority, Congress empowered the President to negotiate the FTA[15] and will soon consider legislation to implement the FTA.

Article II of the Constitution in turn empowers the Executive Branch to conduct U.S. foreign affairs, which includes, among other things, the negotiation of international agreements.[16] In exercising its authority to settle disputes with other nations, the Executive Branch has historically taken a range of actions that affect the claims -- and even the lawsuits -- of its nationals. The courts traditionally have not interfered with such actions. In Dames & Moore v. Regan,[17] which upheld the constitutionality of the United States-Iranian arbitration claims agreement, the Supreme Court recognized the ability of the Executive Branch to settle claims by international agreement where, as here, Congress has approved or acquiesced in the practice.

The FTA falls squarely within this tradition. Recognizing the need to create a free trade area, remove impediments to trade between the nations, and ease bilateral frictions over trade relations, the Executive Branch has negotiated the FTA and its AD/CVD dispute resolution mechanism, pursuant to both its delegation of power from Congress and its inherent authority in foreign affairs.

P.L. 94-618, reprinted in 1974 U.S. Code, Cong. & Adm. News at 2290.

15. See 19 U.S.C. § 2115. Assertions that the President exceeded his authority in negotiating the FTA's dispute resolution provisions are entirely without merit. The delegation of authority to negotiate bilateral trade agreements relied on by the President is broad in scope, and plainly would be interpreted by the courts to permit the negotiation of dispute resolution mechanisms. See Curtiss-Wright, 299 U.S. at 320; Florsheim Shoe Co. v. United States, 744 F.2d 787, 793 (Fed. Cir. 1984) ("[C]ongressional authorizations of presidential power [in the foreign affairs area] should be given a broad construction and not 'hemmed in or "cabined, cribbed, confined" by anxious judicial blinders.'")

16. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

17. 453 U.S. 654 (1981).

In short, the FTA is a product of the pooled authority of Congress (over foreign commerce) and the President (to negotiate international agreements). The agreement, and its various terms and provisions, therefore must be afforded a strong presumption of constitutionality. As the Supreme Court recently stated in similar circumstances:

> when the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[18]

This judicial deference does not, however, entitle Congress or the President to violate the United States Constitution. In this regard, two distinct concerns have been raised with respect to the constitutionality of the FTA's binational panel mechanism. The first is whether Congress has the authority to substitute binational panel proceedings for federal court review of final agency determinations in AD/CVD cases, thus allowing panelists -- who may not be judges, lawyers, or U.S. citizens -- to decide issues traditionally determined by federal judges. The second issue concerns whether rulings rendered by the binational panel can be binding under U.S. law unless the President appoints all of the panel members.

1. The substitution of a binational panel review for judicial review

U.S. law provides several levels of appellate review over final determinations of the U.S. Department of Commerce and U.S. International Trade Commission in AD/CVD cases. Such agency appeals first are heard by the U.S. Court of International Trade ("CIT"), formerly the U.S. Customs Court, a specialized Article III Court created by Congress to

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18. Dames & Moore, supra, n.18, at 668 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,637 (1952) (Jackson, J., concurring). See also Curtiss-Wright, supra n.17, 299 U.S. at 320.

entertain international trade disputes.[19] Appeals from the CIT are in turn entertained by the U.S. Court of Appeals for the Federal Circuit, the successor to the U.S. Court of Customs and Patent Appeals, an Article III court.[20] Finally, the U.S. Supreme Court can grant certiorari in order to review Federal Circuit determinations in AD/CVD cases.

Whatever limits may exist with respect to Congress's authority to remove a dispute from the federal courts and assign it to a nonjudicial body, Congress has full authority to eliminate judicial review of AD/CVD cases and to substitute review by binational panels.

The authority of Congress to regulate the appellate jurisdiction of the U.S. Supreme Court is firmly established. By its terms, Article III of the Constitution provides that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make."[21] (Emphasis added.) Thus, the very grant of judicial power to the Supreme Court affords Congress the authority to limit the Court's appellate powers.[22]

Similarly, the Constitution, which affords Congress the discretion to create "inferior courts," has consistently been construed to allow Congress to limit or remove the jurisdiction of the Article III courts that it creates. As early as 1799, in response to the suggestion that the lower federal courts derive their authority directly from the Constitution, Justice Chase, speaking for the Court, declared that:

> the political truth is, that the disposal of the judicial power (except in a few specified instances [enumerated in

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19. See 28 U.S.C. § 1581.

20. See Federal Courts Improvements Act of 1982, P.L. No. 97-164 96 Stat. 25, 37 (codified at 28 U.S.C. § 1295).

21. U.S. CONST., art. III, § 2. Relevant portions of Article III are set forth in Appendix A.

22. See also Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (noting that the Constitution affords Congress "the power to make exceptions to the appellate jurisdiction of this court [by its] express words.")

> article III, § 2]), belongs to congress. If congress has given the power to this court, we possess it, not otherwise; and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal.

Turner v. The President, Directors, and Company of the Bank of North America, 1 L. Ed. 718, 719 n.1 (1799).[23] Seventeen years later, Justice Story tried to swim against the tide, asserting in Martin v. Hunter's Lessee that the federal courts must be given jurisdiction over all disputes set forth in Article III of the Constitution.[24] But as the Supreme Court recently stated, Justice Story's minority view "did not survive later cases." Palmore v. United States, 411 U.S. 389, 401, n.9 (1972).

This is not to say, however, that the authority of Congress to restrict federal jurisdiction is unlimited. The legislative power to restrict appellate review cannot be used as a device for depriving Americans of their rights, including the right to due process. Thus, a law preventing federal courts from hearing claims that the Congress or the Executive has violated the Constitution would raise serious constitutional questions. As the D.C. Circuit recently declared in Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir. 1987):

> a statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right. We have

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23. Accord, Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938). McIntire v. Wood, 11 U.S. (7 Cranch) 504, 506 (1813); Kendall v. United States, 37 U.S. (12 Pet.) 524, 616 (1838); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850) ("[H]aving a right to prescribe [jurisdiction], Congress may withhold from any Court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.")

24. 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816).

> little doubt that [this] "would be an unconstitutional" infringement of due process.

Id. at 703 (citation omitted).[25] Although the Supreme Court has never explicitly endorsed this view, it has, not surprisingly, shown extraordinary reluctance to read Congressional enactments as withdrawing jurisdiction over constitutional claims.[26]

The FTA is somewhat ambiguous as to whether constitutional claims arising in AD/CVD cases are to be removed from the federal courts and entertained by the binational panel. On the one hand, since the panel is empowered to conduct its review of final AD/CVD determinations under the standard of review set forth in U.S. law, its authority conceivably can be construed to extend to constitutional claims because the applicable review allows inquiry as to whether the AD/CVD determination was "in accordance with law. . . ."[27] The FTA requirement that the panel must apply "general legal principles (FTA, Art. 1904(3)), which includes "due process," (FTA, Art. 1911) offers further support for this view.

On the other hand, however, the agreement does not expressly afford the panel the authority to decide whether agency determinations are in accordance with the importing Party's Constitution. Indeed, the FTA, by its terms, limits the binational panel to an inquiry as to whether final agency determinations are "in accordance with the antidumping or countervailing duty law of the importing Party." FTA, Arts. 1904(2). In light of this limiting language and the historic reluctance of the judiciary to construe federal laws to remove jurisdiction over constitutional claims where such

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25. See also Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), cert. denied, 335 U.S. 887 (1948). (Although Congress "has the undoubted power to give, withhold, and restrict" federal court jurisdiction, "it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation").

26. See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 & n.12 (1986); Johnson v. Robison, 415 U.S. 361, 366 (1984).

27. 19 U.S.C. § 1516a(b).

removal is not express, the Section believes that the FTA should not be construed to remove federal jurisdiction over constitutional claims.

In all events, to remove any uncertainty over the constitutionality of the bipanel review process, the Section recommends that Congress, in passing legislation to implement the FTA, make clear that federal appellate review over constitutional claims is preserved. Such clarifying legislation would ensure that litigants can obtain orderly appellate review with respect to constitutional claims that could arise in AD/CVD cases; such challenges will in fact be rare.[28] The enactment of such a clause thus will preserve the basic intent of the FTA -- to refer the review of issues arising under AD/CVD law to the binational panel -- while at the same time alleviating any concern that litigants are being deprived of constitutional rights.

A second possible limit on Congress's authority to remove federal court jurisdiction was suggested by the Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipeline & Co., 458 U.S. 50 (1982). There, a divided Court held that certain disputes cannot be adjudicated by bankruptcy judges, who do not have life tenure and therefore are not Article III judges. Since the binational panel would not be an "Article III" court, Northern Pipeline conceivably could be read as restricting the kinds of claims it could adjudicate.

Upon close analysis, it is clear that Northern Pipeline does not limit the authority of Congress to restrict appellate jurisdiction in AD/CVD cases. The Northern Pipeline plurality itself expressly recognized that Article III courts have no monopoly on resolving disputes over "public rights."[29] And, the court itself has treated international "unfair trade" remedies as classic examples of public rights.[30]

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28. From time to time, there may be claims that procedures used by Commerce Department or ITC constitute a denial of due process of law.

29. Northern Pipeline, supra, 458 U.S. at 67.

30. See Exparte Bakelite Corp., 279 U.S. 438, 447 (1929) (allowing non-Article III adjudication of trade cases under the predecessor of today's § 337 of the Trade Act of 1930).
(footnote continued)

Further, whether Northern Pipeline precludes the international arbitration of disputes normally heard by federal courts is open to serious doubt. Indeed, in a series of recent rulings, the Supreme Court has upheld agreements to arbitrate, rather than litigate, antitrust and securities law claims -- disputes that implicate important national interests and have traditionally been considered the exclusive province of the federal judiciary.[31] In one such case, the Court allowed the arbitration of an international antitrust claim on the ground that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and a sensitivity to the need of the international commercial system for predictability in the resolution of disputes require" the enforcement of a private agreement to arbitrate the dispute.[32] Significantly, the Court also rejected arguments that arbitration would undermine the efficacy of the antitrust laws, and the ability of parties to vindicate their statutory rights thereunder. As stated by the Court, "[t]here is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism" for remedying antitrust wrongs.[33] Thus,

> [w]here the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. [citation omitted.] And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral

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See also Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 588 (1985) (treating "as a matter of 'public right' an essentially adversary proceeding to invoke tariff protections against a competitor").

31. See Shearson/American Express v. McMahon, 107 S. Ct. 945 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1988); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

32. Mitsubishi Motors Corp., supra n.33, at 629.

33. Id. at 636.

forum, the statute will continue to serve both its remedial and deterrent function.[34]

Disputes arising under the AD/CVD laws similarly can be decided in an alternative forum.[35] Here too, considerations of international public policy -- the desire to avoid trade disputes between the United States and Canada and liberalize trading relations between these nations -- provide a powerful rationale for allowing such public law disputes to be entertained by binational panels rather than Article III courts. Further, as discussed in Section IV(b), inf a, the binational panels, which must apply U.S. law and U.S. standards of review, affords aggrieved parties an adequate opportunity to vindicate their statutory rights under AD/CVD law.

In any event, recent Supreme Court rulings sharply limit the scope of Northern Pipeline. Specifically, the Court has concluded that only "traditional contract action[s] arising under state law" are reserved for Article III Courts. Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 584 (1985); Commodity Futures Trading Commission v. Schor, 106 S. Ct. 3245 (1986). Thus, there is simply no basis for reading Northern Pipeline to preclude the review of final AD/CVD determinations, which do not concern contract rights, by binational panels.

2. The appointment of panel members

The fact that all members of binational panels are not appointed by the President also raises concerns as to whether panel decisions are binding under U.S. law.

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34. Id. at 636-37.

35. Although the arbitration of such antitrust and securities disputes by international or national panels is subject to judicial review, such review is highly circumscribed. See Federal Arbitration Act, 9 U.S.C. § 4, and United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, Art. V(2) (entered into force with respect to the United States, Dec. 29, 1976) (setting forth limited bases of judicial review of arbitral awards, and precluding review altogether where no such award is made). Thus, as a practical matter, there is little difference between the binational panel review of AD/CVD cases, and the arbitration of antitrust and securities claims.

The basis for this concern is the appointments clause of the Constitution, which provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. In Buckley v. Valeo, 424 U.S. 1 (1976), the authority of the Federal Elections Commission ("FEC") was challenged on the basis of this clause. Specifically, Congress had empowered the FEC with "primary and substantial responsibility for administering and enforcing the [Federal Election Campaign] Act." Id. at 109. Yet, the method of selecting the FEC's members was unusual. Apart from ex officio members, two of the FEC's members were to be appointed by the president pro tempore of the Senate, two by the Speaker of the House, and two by the President.

The Court held that these provisions violated the constitutional requirement, set forth in the appointments clause, that the President must appoint all "Officers of the United States." In so ruling, the Court concluded that:

> the term "Officers of the United States" [,] as used in Art. II, defined to include "all persons who can be said to hold an office under the government," . . . is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed [by the appointments clause].

Id. at 125-26 (emphasis added.) The court noted that its interpretation of the appointments clause was influenced by

the separation of powers doctrine, which mandates that Congress should "not exercise executive authority by retaining the power to appoint those who will execute its laws."[36]

On the basis of Buckley, it could be asserted that the binational panel mechanism is unconstitutional because its members, some of whom would not be appointed by the President, would "exercise significant authority pursuant to the laws of the United States." However, in the Section's view, the courts are highly unlikely to mechanically read Buckley to require the nullification of such a central element of the FTA.

First, as more recent rulings indicate, Buckley does not apply to officials that perform their duties pursuant to authority other than federal law. In Seattle Master Builders v. Pacific Northwest Electric Power and Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986), a federal appeals court considered a challenge to the constitutional validity of the Pacific Northwest Electric Power and Conservation Planning Council ("Council"). The Council, composed of members appointed by the governors of four states, was charged with establishing an energy conservation plan for the geographic region served by an agency of the United States Department of Energy. The Council operated pursuant to legislation enacted by the four member states, as well as Congress. In response to an appointments clause challenge, the Ninth Circuit held that the Council's composition was constitutional:

> [t]he Council members do not perform their duties "pursuant to laws of the United States." Rather, the Council members perform their duties pursuant to a compact which requires both state legislation and congressional approval. Without substantive state legislation, there would be no Council and no Council members to appoint.

Id. at 1365.

This reasoning applies with equal force where, as here, the panel members will exercise their authority

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36. 424 U.S. at 119 (citing with approval Springer v. Philippine Islands, 277 U.S. 189 (1928)).

pursuant to an international agreement, and not simply pursuant to U.S. or Canadian law. Presumably anticipating this issue, the Agreement provides specifically that, for purposes of the panel's review, the Parties' dumping and countervailing duty laws "are incorporated into this Agreement." FTA, Art. 1904(2).[37] Thus, the panel members have an independent source of authority.[38] To confirm this interpretation of the FTA, the Section recommends that the FTA's implementing legislation, and the legislative history thereto, make plain the intent of Congress that the FTA's binational panel review process is based on international law, and not only the law of the United States.

Support for the constitutionality of the appointment method for panel members also is reflected in the longstanding practice of the Executive Branch, which frequently negotiates international agreements establishing such panels in order to resolve disputes between nations. In fact, from the eighteenth-century Jay Treaty to the 1981 Algiers Accords establishing the Iran-United States Claims Tribunal, the United States has repeatedly entered into binding international arbitration agreements allowing each Party to name its own arbitrators. Significantly, none of these agreements has ever been challenged as unconstitutional under the appointments clause. See, e.g., J. Simpson & H. Fox, International Arbitration: Law and Practice 1 (1959). Indeed, as a practical matter, no country in the world will agree to arbitrate disputes with the United States if the United States insists on appointing all of the arbitrators.

Finally, the separation of powers considerations underlying the Buckley ruling also do not require the invalidation of the FTA's binational mechanism. This is not

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37. See also U.S. Department of Commerce, "Summary of the U.S.-Canada Free Trade Agreement," at 36 (noting that "[p]anel decisions would be binding as a matter of international law with respect to the particular matter reviewed.")

38. It is well-established that international law is a part of the law of the United States. See The Paquete Habana, 175 U.S. 677, 700 (1900); Perry v. United States, 294 U.S. 330 (1935). See also Restatement (Revised) of the Foreign Relations Law of the United States, § 131(1) ("International Agreements of the United States are law of the United States and supreme over the law of the several states.").

a situation, as in Buckley, where Congress seeks to make interbranch appointments, thereby invading the authority of Executive Branch.

B. The Implications Of Binational Panel Review For Litigants In AD/CVD Cases

Another important question, which has both constitutional and practical dimensions, is whether binational panel review affords procedural due process to litigants in AD/CVD proceedings.

From a constitutional standpoint, the issue is whether the due process clause of the Fifth Amendment requires judicial review of final AD/CVD determinations. In the view of the Section, it does not (except with respect to constitutional claims, which, as discussed in Section IV(A)(1) supra, may require judicial review). It is well-established that the requirements of due process are not fixed, and must be shaped to fit the particular circumstances and the particular rights at issue. From a due process standpoint, the crucial issue is not whether the forum is an Article III court, but whether the parties have had an opportunity to be heard before an impartial tribunal.[39]

As a general matter, the parties to AD/CVD proceedings are afforded due process administrative proceedings before the ITC and the Commerce Department, with such safeguards as notice, the right to participate in the hearing and file briefs, and a written determination by impartial decision-makers. Putting aside review of constitutional questions, applicable case law suggests that, from a due process standpoint, no review of these administrative determinations may be necessary.[40] Here, however, the FTA has empowered binational panels to review such agency determinations. Thus, the only process question that could arise is whether the FTA's binational panel review

39. See cases cited at note 40, infra.

40. See, e.g., Murray's Lessee v. Hoboken Land and Improvement Co., 259 U.S. (18 How.) 272, 280; Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1 (D.C. Cir. 1979); L.B. Wilson, Inc. v. Federal Communications Commission, 170 F.2d 793, 802-3 (D.C. Cir. 1948) ("[D]ue process is not necessarily judicial process; it may for some purposes be accorded by an administrative board or officer."); Sessions v. Conn., 293 F. Supp. 834 (D. Conn. 1968).

mechanism can, in practice, serve as a check on agency error (i.e., actions by Commerce or the ITC that are arbitrary, capricious, not in accordance with law, or an abuse of discretion). Specifically, does the mechanism afford aggrieved parties a right to make arguments, is its decisional mechanism impartial, and does it have the ability to act to curb administrative errors -- which the federal courts have effectively done over the years in the international trade area. As discussed below, it is the Section's view that, on balance, the FTA establishes basic procedures that Congress can and should build upon in order to ensure a fair, unbiased, and effective review of final AD/CVD decisions.

1. The binational review mechanism contains a number of provisions designed to promote impartial and orderly proceedings.

The FTA contains a number of safeguards to promote the impartiality and orderliness of the review process.

All private parties that have a right to judicial review of AD/CVD determinations under existing U.S. law[41] are entitled to binational panel review under the FTA. FTA, Art. 1904(5). Although aggrieved parties must request a panel review through their respective governments, the FTA provides that once such a request is made, the government involved must request panel review. And, once a panel review is begun, any party who, pursuant to the law of the importing party, would have had standing to appear and be represented in a domestic judicial review proceeding, shall have the right to appear and be represented by counsel before the panel. FTA, Art. 1904(7).

As under domestic law, the FTA provides a mandatory mechanism for maintaining the confidentiality of business proprietary and other privileged information, and it requires sanctions for the improper release of such information. FTA,

41. In certain circumstances, the FTA does not deprive litigants of federal court review of AD/CVD determinations. Thus, where neither country requests a panel review, judicial review of a final AD/CVD determination is still available under domestic law. FTA, Art. 1904(a). Also, judicial review is still available for other currently appealable determinations not subject to binational panel review, including determinations not to initiate investigations and preliminary injury determinations.

Art. 1904(14). At the same time, these provisions make clear that confidential information under protective order will continue to be available to counsel for the Parties. FTA, Annex 1901.2(7).

The panel may not undertake an unlimited inquiry into the propriety of a final AD/CVD determination or create its own supranational law. As noted above, the panel is bound by the existing standards of review currently used by the Court of International Trade in the United States and the Federal Court of Appeal in Canada. FTA, Arts. 1904(3) and 1911. Further, the panel inquiry is limited to whether the final AD/CVD determination is "in accordance with the antidumping or countervailing duty law of the importing Party." FTA, Art. 1904(2). And, for the purpose of this review, the panel is bound to follow not only domestic AD/CVD statutes, but the legislative history, regulations, and practice thereunder to the same extent that "a court of the importing party would rely on such materials in reviewing an final determination of the competent investigating authority." FTA, Art. 1904(2). FTA, Art. 1904(13). Finally, the panel cannot develop new evidence, but must undertake its review on the basis of the administrative record. In short, the Panel must perform the duties of a federal appeals court, and apply existing domestic AD/CVD law to AD and CVD determinations under existing review standards.

Other traditional elements of U.S. judicial review also are present. The FTA affords parties to AD/CVD cases with notice of panel proceedings, the right to at least one hearing before the panel, and the opportunity to provide written submissions and rebuttal arguments. The panel decision also must be in writing, and contain findings of fact and its reasoning. FTA, Annexes 1901.2(5).

Moreover, the FTA takes steps to require that panel members be independent; they cannot be affiliated with or take instructions from the U.S. or Canadian governments. FTA, Annex 1901.2. The FTA also establishes guidelines for selecting the roster of potential panelists, which require that selected persons be of good character, high standing, and repute, and be selected on the basis of objectivity, sound judgment, and general familiarity with international trade law.[42]

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42. The United States and Canada also can build upon these rules in order to ensure panel independence. For example, a (footnote continued)

Additionally, the FTA allows extraordinary challenges to panel decisions on the grounds of gross misconduct by panel members, a departure from a fundamental rule of procedure, or acts by the panel that are "manifestly" in excess of its powers, authority or jurisdiction. FTA, Art. 1904(12). See also FTA 1904.13 (setting forth extraordinary challenge procedure). The prospect of such extraordinary challenges will serve as an effective check on the panel's exercise of its authority.

Finally, it has been argued, and it may prove to be the case, that the binational panels will improve upon judicial review in at least one respect -- speedy decisionmaking. The FTA imposes a series of strict deadlines on the panel review process. The panel must make its final decision within 315 days of the date on which a review request is made.[43] In contrast, there are no time limits in the United States on appeals from final AD/CVD determinations, and the appeal of a final AD or CVD determination before the U.S. Court of International Trade alone frequently takes longer than a year before decision is rendered.[44]

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mechanism could be created by the parties to address potential conflicts of interest of panel members. In this regard, the procedural rules or code of conduct could specify that persons selected as panel members are required to disclose, after his or her selection, any interest or relationship likely to affect his or her impartiality or which might create an appearance of partiality or bias. See, e.g., Code of Ethics for Arbitrators in Commercial Disputes, reprinted in Coulson, R., Business Arbitration -- What you need to know (American Arb. Assoc. 1987).

43. The FTA also sets other deadlines for intermediate steps in the panel review process, including: the filing of the complaint (30 days); the designation or certification of the administrative record and its filing with the panel (30 days); the filing of the complainant's brief (60 days); the filing of the respondents' brief (60 days); the filing of reply briefs (15 days); the convening of the panel and hearing of oral argument (15 to 30 days); and the issuance of the panel decision (90 days). FTA, Art. 1904(14).

44. Of course, the speedy operation of the binational panel review process can be impeded by unexpected delays caused by lengthy remands, extraordinary challenges to panel decisions, and the like.

In short, given the ample opportunities that litigants in AD/CD cases have to present their views before federal agencies and binational panels and the various safeguards that exist, it would be very difficult to conclude that these procedures provide less process than is "due"[45] under the Constitution.

3. The FTA leaves open a number of issues with respect to binational panel review that should be addressed in a manner that ensures orderly and impartial proceedings.

The FTA does not explicitly address a number of aspects of the Panel's operation, which should be dealt with in either the rules of procedure established by the parties or through domestic implementing legislation. Several of these matters are identified below.

a. First, the FTA does not clearly address the question of whether a panel ruling on a legal issue is binding upon a subsequent panel facing the same or similar question. Article 1904(9), which declares that panel decisions shall be binding on the parties with respect to the particular matter between the parties that is before the panel, can be read to limit the effect of panel decisions. Yet, this provision is not entirely clear (and simply may be designed to ensure that the panel decisions are, in fact, binding on the parties). Thus, some clarity is needed in this area. In order to encourage certainty and predictability and to preclude unnecessary appeals, the Section recommends that, in the absence of changes in the law (including intervening judicial decisions), a later panel be bound by earlier panels' interpretation of the same country's AD/CVD law.

A related question concerns the precedential value, if any, of panel decisions in federal court reviews of AD/CVD determinations involving imports from nations other than Canada. Since the FTA only pertains to U.S.-Canadian trade, and does not extend to U.S. or Canadian trade with other nations, panel decisions made thereunder can have no binding effect on AD/CVD determinations with respect to trade with other nations. Yet such panel decisions nevertheless may

45. Of course, whether the process afforded a particular litigant by a binational panel in a particular case is "due" is a matter that would need to be determined on a case-by-case basis.

offer useful guidance to the courts in AD/CVD cases. Accordingly, Congress may wish to stipulate, in its implementing legislation or the legislative history, that the federal courts may, at their discretion, draw on such decisions for their persuasive force, in cases where U.S. precedents are not dispositive.

b. The FTA does not say who will choose members of the roster or of individual panels. If the binational panel procedure is to be fair and free of political bias, the person(s) selecting the members of the roster and the individual panels must also be impartial. Both countries' procedures for selecting representatives should safeguard the impartiality of the selection process.

Further, the FTA does not specify whether private parties can participate in the government's choice of candidates for the roster of potential panelists, its consultations on the other country's candidate selection, or its peremptory and extraordinary challenges. Since AD/CVD cases implicate important interests of private companies, Congress may find it appropriate to give private parties a role in these decisions, perhaps by requiring the U.S. government to consult with domestic parties to the proceeding on these matters.

To further ensure the impartiality of panelists, a carefully tailored financial disclosure requirement should be adopted, pursuant to which roster members that are being considered for panel membership in a particular case must make the requisite disclosures to both the Parties and private litigants in the case. However, the Section urges that the FTA Parties, in drafting such disclosure requirements, consider the potential adverse impacts of highly detailed and burdensome disclosure requirements (such as those required under federal law for U.S. government officials and federal judges),[46] which could deter talented and qualified individuals from serving on the roster. For the same reasons, the Section believes that required financial disclosures should not ordinarily be made public.

c. Additionally, the FTA requires the parties to establish a code of conduct for panelists (see FTA, Art. 1910), which also will foster impartiality and independence. This vitally important task has not yet been

46 See, e.g., 28 U.S.C. App. C ("Judicial Personnel Financial Disclosure Requirements").

undertaken. It should be completed promptly, and with wide public participation. Clear standards of conduct should be set. For example, the code should, among other things, preclude panelists from ex parte contacts with the litigants and proscribe them from accepting any gifts from the parties.

Further, the FTA states that the extraordinary challenge committee will be composed of current and former U.S. and Canadian federal judges. While the appointment of former U.S. federal judges to such committees is appropriate, the Section notes that the appointment of current federal judges could raise a substantial ethical issue under the Code of Conduct for United States Judges (the "Code"), which has been adopted by the U.S. Judicial Conference for federal judges.[47]

Specifically, Canon 5 of the Code, which states that a judge "should regulate extra-judicial activities to minimize the risk of conflict with his judicial duties," expressly prohibits a federal judge from acting "as an arbitrator or mediator." See Code, Cannon 5(E). Although the Code, until recently, did allow judges to act as arbitrators in certain circumstances, it was amended to preclude such non-judicial activities out of concern that: (1) arbitrated matters could come before the court on which the judge serves; (2) the prestige of the judicial office could be used to support an arbitration award; (3) the court could be drawn into political or social controversies; and (4) there could be a diversion of the judge's time. Moreover, Canon 5(G) of the Code states that a judge "should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless the appointment of a judge is required by Act of Congress."

The Code's restrictions, and the underlying policy considerations, suggest that it would not be appropriate for current federal judges to serve as members of extraordinary challenge committees.[48] Thus, the parties may want to

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47. The Code is virtually identical to, and based on, the American Bar Association Code of Judicial Conduct.

48. There also may be constitutional constraints on extra-judicial conduct by judges that interfere with their ability
(footnote continued)

reconsider this approach, and limit the committee membership to former judges. Of course, should the United States decide that the concerns underlying the ban are inapplicable and seek to implement the FTA rule, Congress should create an exception to Canon 5 in order to allow judges to participate free of ethical constraints.

d. Another issue that warrants study concerns the review of final AD/CVD determinations in multiple-country investigations. Since the Trade and Tariff Act of 1984 mandated that subject imports from two or more countries be cumulated in most circumstances (see 19 U.S.C. 1677(7)(C)(iv)), the majority of U.S. trade cases are brought against several countries. And, if Canadian goods are included in future multiple-country cases, the final agency determination regarding imports from Canada would be reviewed by the binational panel, while the decision regarding imports from other countries would be reviewed by a court. If the court and the panel remand to the agency with conflicting instructions, it is uncertain how the agency should resolve the inconsistent findings.

While the Section has no position on what steps should be taken, it should be recognized there are a number of available options. First, imports from Canada could be exempted from cumulation (as may be done with imports of Israel under the Omnibus Trade and Competitiveness Act of 1988 that is now pending in Congress). Second, a fast track procedure could be established for accelerated judicial review of final AD/CVD determinations with respect to non-Canadian imports in cumulated cases involving Canada. Since, as noted above, binational panels are bound by U.S. antidumping law, including U.S. judicial interpretations thereof, such accelerated rulings would necessarily be binding on subsequent panel decisions in the same case and, hence, produce uniform and predictable results. Given the limited time available for accelerated review before a binational panel ruling in a case (i.e., one year), it would not be practical, however, to have accelerated review by both the U.S. Court of International Trade and the Federal Circuit. Thus, the accelerated review would have to be undertaken by one of these two courts only. A third option would be for Congress to make binational panel decisions in

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to perform their constitutionally required duties. See, Application of President's Commission On Crime, 763 F.2d 1191 (11th Cir. 1985); Hobson v. Hansen, 265 F.Supp. 902 (D.D.C. 1967).

cumulated cases binding on imports from the other countries involved. A further choice is to wait and see whether the problems that are foreseen actually occur in practice. In this regard, it also should be noted that, under the FTA, the binational panel review mechanism will be replaced by a new AD/CVD regime in 5-7 years time. In all events, these and other possible policy options have advantages and disadvantages that should be carefully considered.

e. Finally, although the FTA, as noted above, establishes a mechanism to protect confidential business information, it leaves it to the Parties to establish judicial enforcement mechanisms therefor. See FTA, Art. 1904(15)(e). The Section recommends that Congress, in crafting such a mechanism, adopt some variant of the contempt of court procedure used by the U.S. Court of International Trade (see Rules of the United States Court of International Trade, Rule 63). The procedure should provide federal judges with the discretion, upon finding a violation of a confidentiality order, to adopt a broad range of sanctions, including fines. Such a procedure has the advantage that it can be invoked against all persons subject to U.S. jurisdiction that might appear before the binational panel. Additionally, under the contempt of court procedures, a federal court could refer violations of protective orders by professionals, including lawyers, accountants and the like, to the appropriate professional organization for further disciplinary actions.

IV.

CONCLUSION

The dispute resolution mechanisms of the FTA are imaginative and far-ranging. They have provoked many concerns, both constitutional and practical. In the Section's view, the constitutional concerns can be resolved by proper implementing legislation. Further, the Section believes that the FTA has established a number of features to facilitate impartial and orderly resolution of disputes, and that Congress can build on this effort by addressing a number of practical questions raised by the agreement in both U.S. implementing legislation and in its subsequent oversight with respect to the operation of the FTA and such legislation.

APPENDIX A

Article III of the Constitution provides, in relevant part, as follows:

> SECTION 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all cases affecting Ambassadors, other public ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- between a State and Citizens of another State; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign states, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The Trial of all Crimes, except in cases of Impeachment, shall be held in

> the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place of Places as the Congress may by Law have directed.

U.S. Const., Art. III, §§ 1 & 2.

Senator HEFLIN. Thank you. Written questions will be submitted to you, and if you would, we would like to have them back by close of business on Monday.

If there is no other business, we will adjourn the hearing.

[Whereupon, at 3:25 p.m., the committee was adjourned.]

APPENDIX

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS
STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE

MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL
D.J. DUKE SHORT, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 20, 1988

The Honorable Alan F. Holmer
General Counsel
Office of the U.S. Trade Representative
Winder Building
600 17th Street, N.W.
Washington, D.C. 20506

Dear Ambassador Holmer:

In Chairman Biden's absence, I am forwarding written questions to you in connection with the U.S.-Canada Free-Trade Agreement. Given the "fast track" nature of the committee's consideration of the Agreement, we ask that answers be submitted in writing by the close of business on Monday, May 23.

Sincerely,

Mark Gitenstein

Mark Gitenstein
Chief Counsel

Canada Free Trade Agreement DeConcini

1. The Canadian government has subsidized its nonferrous metals and uranium mining industries through such programs as equity investments, long-term loans, unconditional loan guarantees and outright government grants totalling nearly $4 billion in recent years. Under the terms of the proposed Free Trade Agreement, parties challenging these subsidies are referred to a binational panel for review. Is that correct?

If the ITC recommends relief due to Canadian subsidies and the Commerce Department grants such relief, what action would be taken under the terms of the Agreement?

Would the party have access to judicial review if the Administration refuses to implement relief granted by the Commerce Department and/or affirmed by the binational panel?

DeConcini

PANEL ONE (USTR AND ITA)

HOW DO YOU JUSTIFY THE INEQUALITY THAT WILL EXIST WITH IMPORTERS OF MERCHANDISE FROM CANADA AND IMPORTERS OF SIMILAR MERCHANDISE FROM OTHER COUNTRIES. ONE WILL BE DENIED JUDICIAL REVIEW OF AN ITA OR ITC DETERMINATION WHILE THE COMPETITOR IMPORTING SIMILAR MERCHANDISE FROM ANOTHER COUNTRY WILL HAVE RECOURSE TO SUCH REVIEW.

OR WHAT ABOUT THE CASE WHERE THE ITA OR ITC INVESTIGATE A PRODUCT WHICH IS IMPORTED FROM CANADA AND OTHER COUNTRIES. THE FINAL DETERMINATION AS TO INJURY, WHICH MAY WELL BE A CUMULATIVE DETERMINATION IN THESE KINDS OF CASES, WOULD BE BIFURICATED WITH THE CANADIAN ASPECT GOING TO THE BINATIONAL PANEL AND THE OTHER COUNTRY ASPECTS TO THE COURTS OF THE UNITED STATES. IS THIS NOT ONLY UNEQUAL, BUT UNWORKABLE?

HEARING ON U.S. -- CANADA FREE TRADE AGREEMENT

MAY 20, 1988

QUESTIONS

SENATOR CHARLES GRASSLEY

PANEL

Alan Holmer, U.S. Trade Representative's Office

Jeanne Anderson, Commerce Department.

1. BEFORE I ADDRESS THE BINATIONAL PANEL, I WOULD LIKE TO SPEND A FEW MOMENTS ON SOME OTHER SUBJECTS OF THE TREATY. FIRST, AN ISSUE THAT HAS GIVEN ME GREAT CONCERN IN THE OMNIBUS TRADE BILL RECENTLY SENT TO THE PRESIDENT -- ETHANOL. WHAT IMPACT WILL THE FREE TRADE AGREEMENT HAVE ON ETHANOL COMING TO THE UNITED STATES FROM CANADA?

ETHANOL IS A FUNGIBLE COMMODITY. IT CAN BE MADE FROM CHEAP WINE ALCOHOLS, TRANSHIPPED FROM OTHER NATIONS TO CANADA, AND EXPORTED TO THE UNITED STATES. HOW EXACTLY DOES THE AGREEMENT TREAT THIS POTENTIAL PROBLEM? DOES IT REQUIRE THAT DUTY FREE ETHANOL BE MADE EXCLUSIVELY FROM U.S. OR CANADIAN PRODUCT?

2. THE AGREEMENT PROVIDES FOR A ROLLBACK OF TARIFFS OVER A TEN YEAR PERIOD. CANADA, HOWEVER, HEAVILY SUBSIDIZES MUCH OF ITS INDUSTRY, INCLUDING AGRICULTURE. HOW WILL THESE MANDATED ROLLBACKS TAKE INTO CONSIDERATION THE SUBSIDIES? WITHOUT ADDRESSING THE SUBSIDY ISSUE, ISN'T THIS JUST A TARIFF REDUCTION AGREEMENT?

... Questions submitted by Senator Thurmond

For John O. McGinnis

QUESTIONS FOR PANEL I

~~This question is for any panel member.~~

There appears to be Separation of Powers concerns regarding the creation of this Binational Panel. However, litigation can take months, even years to resolve. Since the United States and Canada are allies, do you believe it makes more sense for a panel to promptly resolve disputes as opposed to long, drawn out court battles?

QUESTIONS OF SENATOR HATCH

JOHN O. MCGINNIS:

1) I AM INTERESTED IN THE MEMBERSHIP OF THE PANEL. THE MEMBERS WILL BE CHOSEN FROM A POOL OF 50 CANDIDATES, IS THAT CORRECT?

CAN THESE CANDIDATES BE SITTING JUDGES? ARE THEY REQUIRED TO BE ATTORNEYS?

WILL CHOSEN MEMBERS RETAIN THEIR PREVIOUS EMPLOYMENT SUCH THAT THEIR TENURE ON THE BINATIONAL PANEL IS ESSENTIALLY PART TIME?

GIVEN THAT INTERNATIONAL TRADE LAW IS A VERY SPECIFIC AREA OF EXPERTISE, I WOULD EXPECT THE FIELD OF ELIGIBLE EXPERTS TO BE RELATIVELY SMALL. WHAT DOES OR SHOULD THE ENABLING LEGISLATION DO TO ENSURE THAT BOTH THE CANADIAN AND AMERICAN MEMBERS HAVE NO CONFLICT OF INTEREST WITH RESPECT TO THE CASES THEY WILL HEAR?

QUESTIONS OF SENATOR HATCH

M. JEAN ANDERSON:

1) IT IS MY UNDERSTANDING THAT NONE OF THE OTHER TRADE AGREEMENTS MADE UNDER THE 1974 TRADE ACT HAVE PROVIDED FOR BINATIONAL PANELS. WHY WAS IT NECESSARY TO CREATE SUCH A PANEL IN THIS INSTANCE?

2) GIVEN THAT VARIOUS CONGRESSIONAL COMMITTEES ARE CURRENTLY NEGOTIATING THE PROVISIONS OF THE IMPLEMENTING LEGISLATION, IS THERE FLEXIBILITY TO AMEND THIS PROVISION OF THE FREE TRADE AGREEMENT? FOR EXAMPLE, WOULD IT BE POSSIBLE TO CONDITION CONGRESSIONAL APPROVAL ON DELETING CHAPTER NINETEEN OR TO EXTEND ARTICLE III REVIEW OF THE DECISIONS OF THIS PANEL?

3) THE USE OF THIS BINATIONAL PANEL HAS THE EFFECT OF REDUCING U.S. SOVEREIGNTY TO MAKE AND ADJUDICATE FINAL DECISIONS IN TRADE DISPUTES, AND MANY ARE CONCERNED THAT SUCH A PANEL MAY BE USED AS A MODEL FOR FUTURE MULTILATERAL TRADE NEGOTIATIONS. WHY ISN'T THIS PANEL BAD PRECEDENT FOR FUTURE TRADE AGREEMENTS?

QUESTIONS FOR AMBASSADOR HOLMER

1. Does the substitution of a binational panel for Article III review in Canadian antidumping and countervailing duty cases foreshadow the end of the Court of International Trade?

2. I understand that the Agreement provides for the establishment of a statutory review panel to minimize the possibility that amendments to Canadian or American antidumping and countervailing duty laws might undercut the benefits of the Agreement.

- Could you please explain how this review panel would work? Who would actually negotiate with the Canadians on a specific amendment? Congress? And if not Congress, how can the Admnistration speak for Congress?

QUESTIONS FOR MS. ANDERSON

1. Ms. Anderson, how would cumulation cases involving several different countries be handled under this new system? As I understand the current system, the International Trade Commission adds together the effects of similar products imported by different countries to determine whether injury has occurred.

- Does the Commission determine the injury of each individual country, or only the aggregate injury?
- If only in the aggregate, how would the panel assess Canada's liability?
- Are you concerned about the disparate results that may arise from the same complaint and what effect this may have on our other trading partners?

2. Does the substitution of a binational panel for Article III review in Canadian antidumping and countervailing duty cases foreshadow the end of the Court of International Trade?

3. I understand that the Agreement provides for the establishment of a statutory review panel to minimize the possibility that amendments to Canadian or American antidumping and countervailing duty laws might undercut the benefits of the Agreement.

- Could you please explain how this review panel would work? Who would actually negotiate with the Canadians on a specific amendment? Congress? And if not Congress, how can the Administration speak for Congress?

4. The Agreement provides that final decisions will be issued by the panel within 315 days of the request for a panel.

- How long does it normally take for a decision to be handed down by the Court of International Trade?
- What happens if the panel is unable to meet this deadline?
- Is there any recourse for the complaining parties?

5. The Agreement provides that each country will have four preemptory challenges in the selection of panel members.

- Do the private parties have the same right?

6. The Agreement requires the Interagency selection group to consult with Congress in the selection of roster candidates.

- Is there a similar requirement for the selection of individual panels?
- Is this consultation requirement equivalent to the advise and consent role we have with respect to the selection of U.S. judges?

7. An extraordinary challenge is available where one of the three following actions has materially affected the panel's decision and threatens the integrity of the binational panel review process:

(1) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,

(2) the panel seriously departed from a fundamental rule of procedure, or

(3) the panel manifestly exceeded its powers, authority or jurisdiction as set forth in Article 1904.

- What happens if the panel clearly misapplied the applicable law? Is there any appeal?

8. I can understand where you would not want the extraordinary challenge procedure to function as a routine appeal. However, not requiring either Government to invoke the procedure upon request by private parties gives the government considerable power and flexibility that it presently does not have.

- What would prevent the government from ignoring a request for review just because it did not feel it was in the government's best interest to pursue the matter?
- Can the private parties appeal the government's decision?

Reform questions

QUESTIONS FOR PROFESSORS

1. What are the implications of the Office of Legal Counsels position for international law and the negotiation of international agreements?

asked 2. The Finance Committee recently met and adopted an "either/or" approach to resolving the controversy over whether panel decisions can be implemented directly by the Commerce Department or the International Trade Commission. The Committee adopted language to the effect that such decisions are self-executing. In the event that this provision is found to be unconstitutional, they included language authorizing the President to direct the appropriate governmental agency to take the necessary actions to implement the ~~agency~~ panel decision.

- Please comment on the constitutionality of these two alternatives.
- Do you see a problem with the President directing an independent agency?

answered 3. Professor Lowenfeld, how do you view the precedence of panel decisions?

UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

May 23, 1988

Mr. Mark Gitenstein
General Counsel
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Gitenstein:

Following the Committee's hearing on May 20 on the U.S. Canada-Free Trade Agreement, written questions were submitted to Ambassador Alan Holmer for response. Attached are responses to those questions which fall under the responsibility of the Department of Commerce. It is our understanding that responses to the remaining questions will be transmitted under separate cover from the Treasury Department.

Sincerely,

M. Jean Anderson
Chief Counsel for International Trade

Enclosures

Senator DeConcini

Question 1

The Canadian government has subsidized its nonferrous metals and uranium mining industries through such programs as equity investments, long-term loans, unconditional loan guarantees and outright government grants totalling nearly $4 billion in recent years. Under the terms of the proposed Free Trade Agreement, parties challenging these subsidies are referred to a binational panel for review. Is that correct?

If the ITC recommends relief due to Canadian subsidies and the Commerce Department grants such relief, what action would be taken under the terms of the Agreement?

Would the party have access to judicial review if the Administration refuses to implement relief granted by the Commerce Department and/or affirmed by the binational panel?

Response

The U.S. countervailing duty law is absolutely unchanged by the U.S.-Canada Free Trade Agreement. Consequently, a U.S. company or industry challenging Canadian Government subsidization of products exported to the United States would file a petition under our countervailing duty law, the Commerce Department and the International Trade Commission (ITC) would investigate the allegations of subsidies and injury and make determinations exactly as they do now, and if their decisions were affirmative, countervailing duties would be imposed on the Canadian imports. Under the FTA, however, a party to the proceeding who wanted to challenge the Commerce or ITC determination would usually have review in a quasi-judicial binational panel rather than the Court of International Trade.

We expect panel decisions taken under the terms of the FTA to be fully consistent with decisions that would have been reached by the Court of International Trade. Members of binational panels must be selected for objectivity and knowledge of international trade law. Under the FTA, they must apply by reference U.S. CVD law--including the statute, the legislative history, regulations, administrative practice, and judicial precedent--and the U.S. standard of judicial review in reviewing decisions of U.S. agencies. If a panel were to depart from that strict mandate, its decision would be subject to review by a three member committee of judges or former judges.

The countervailing duty law is a highly nondiscretionary law. It does not allow the administrative agencies--or a court or binational panel--to take into account foreign policy or other extraneous considerations. If subsidies and injury are demonstrated, countervailing duties must be imposed. The Free Trade Agreement does not permit a different result.

The Free Trade Agreement does not contemplate a refusal by either government to implement relief ordered by an administrative agency and/or affirmed by the binational panel. Our law requires the imposition of countervailing duties if Commerce and the ITC make affirmative determinations. A binational panel's decision affirming Commerce and/or ITC determinations to grant relief is absolutely binding on the U.S. Government (as it is on the Canadian Government in a Canadian case against U.S. products) under the terms of the Agreement.

Senator DeConcini

Question 2

How do you justify the inequality that will exist with importers of merchandise from Canada and importers of similar merchandise from other countries? One will be denied judicial review of an ITA or ITC determination while the competitor importing similar merchandise from another country will have recourse to such review.

Or what about the case where the ITA or ITC investigate a product which is imported from Canada and other countries. The final determination as to injury, which may well be a cumulative determination in these kinds of cases, would be bifurcated with the Canadian aspect going to the binational panel and the other country aspects to the courts of the United States. Is this not only unequal, but unworkable?

Response

We think the FTA will create no inequality between importers of merchandise from Canada and importers of similar merchandise from other countries. Importers of Canadian merchandise will receive quasi-judicial review by an independent binational panel which, under the terms of the FTA, must apply U.S. law and U.S. judicial standards just as would a U.S. court. Any failure of a panel to adhere to its mandate -- in effect, to review a determination in a U.S. case just as the Court of International Trade would review that determination -- will result in an appeal to an Extraordinary Challenge Committee of judges or former judges.

As to cumulated cases, we think the problem is more apparent than real. First, injury determinations in which Canadian imports are cumulated with imports from other countries, and are a substantial factor in total imports, are relatively rare. Second, under current antidumping and countervailing duty law, if imports from countries A, B, and C are concurrently investigated and cumulated for purposes of the injury determination, they remain cumulated for injury purposes even though country A's imports are found not to have been dumped or subsidized. Consequently, if there is any inequity, it arises not from bifurcated review as a result of the Free Trade Agreement, but from current law.

We have considered a number of options for dealing with cumulation situations in the FTA context. We believe that the issue will be fairly and workably resolved by (1) providing in the implementing bill that a court is not bound by, but may consider, the decision of a panel; and (2) making clear in the Statement of Administrative Action that a court, in reviewing an injury determination in which imports from several countries were cumulated, must take the injury determination as the International Trade Commission made it, rather than as it may have been modified by panel review. Thus, if a panel upheld

subsidy and injury findings on Canadian products, that finding would apply to the Canadian goods; but the court might still find a deficiency in the International Trade Commission's injury finding, and an ITC decision on remand would apply only to imports from other countries. Likewise, the panel might remand the Canadian portion, but the court could still uphold the agency determinations, and its decision would be effective for non-Canadian imports. This solution holds Canada to the results of panel decisions yet ensures that third countries will not, by virtue of the FTA, obtain "decumulation" that is not available under current law.

Senator Thurmond

Question 1

There appears to be Separation of Powers concerns regarding the creation of this Binational Panel. However, litigation can take months, even years to resolve. Since the United States and Canada are allies, do you believe it makes more sense for a panel to promptly resolve disputes as opposed to long, drawn out court battles?

Response

We believe that the legislation we have proposed is fully consistent with the separation of powers, because it makes clear that decisions of the binational panels will be binding under international law, but not domestic law.

We think the binational panel process established by the U.S.-Canada Free Trade Agreement provides a number of important benefits to U.S. industries, whether they are petitioners or importers in U.S. antidumping or countervailing duty cases against Canadian imports, or exporters faced with Canadian cases against U.S. imports. Chief among these will be the business certainty created by expeditious panel decisions. Currently, judicial review of agency determinations in U.S. antidumping and countervailing duty cases often takes at least a year (and often two or three years) in the Court of International Trade, and appeals to the Court of Appeals for the Federal Circuit can add significant additional time. Throughout these long, drawn-out appeals, uncertainty reigns over whether antidumping and countervailing duties are actually payable. Moreover, lengthy litigation is extremely expensive, and the expense alone may sometimes make judicial review effectively unavailable, particularly to small companies and industries. Under the Free Trade Agreement, quasi-judicial panel decisions are to be rendered within 315 days from the date a panel is requested, and further extraordinary appeals are likely to be necessary rarely, if ever.

While the binational panel process was negotiated with a view to ensuring that private parties' rights were fully preserved, the expeditiousness of the panel process should also help eliminate unnecessary trade frictions between the United States and Canada.

Senator Hatch

Question 1

I am interested in the membership of the panel. The members will be chosen from a pool of 50 candidates, is that correct?

Can these candidates be sitting judges? Are they required to be attorneys?

Will chosen members retain their previous employment such that their tenure on the binational panel is essentially part time?

Given that international trade law is a very specific area of expertise, I would expect the field of eligible experts to be relatively small. What does or should the enabling legislation do to ensure that both the Canadian and American members have no conflict of interest with respect to the cases they will hear?

Response

Under the FTA, before the Agreement enters into force, the two governments are to develop a 50-person roster of potential panelists, each government selecting 25. Roster members must be U.S. or Canadian citizens, and must be of good character, high standing and repute. They must be chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law. They may not be affiliated with either government and in no event may take instructions from either government. Panelists would normally be selected from this roster. The Agreement contemplates the possibility of appointing a panelist who was not on the roster, but such person must meet all qualifications for roster membership. We think it unlikely that appointments will be made except from the roster.

In negotiating the FTA, we specifically provided for the possibility that sitting judges might be roster members. It was our view that judges would bring to the panel the kind of stature, independence, objectivity, and competence that panelists must have, and that judges of the Court of International Trade, in particular, could bring to the panels specific expertise in antidumping and countervailing duty laws. However, as we have worked with a number of Congressional Committees on the implementing bill, the Committees, scholars, and bar associations have raised both legal and practical concerns over the appropriateness of sitting judges serving as roster or panel members. In particular, the American Bar Association has noted that the appointment of sitting judges might raise ethical issues under the Code of Conduct for United States Judges, which has been adopted by the U.S. Judicial Conference for federal judges. In any event, we intend to rely upon former judges as a source of roster and panel members.

The Agreement provides that a majority of the panelists on each five-member panel must be lawyers in good standing. The chairman of each panel must also be an attorney.

It is anticipated that service on a panel will normally be only a part-time responsibility for panelists. Consequently, the FTA provides that a panelist may engage in other business during the term of the panel, but only if such other business comports with the Code of Conduct for panelists and only if it does not interfere with performance of the duties of the panelists. While acting as panelist, a panelist may not appear as counsel before another panel.

Ensuring that both Canadian and U.S. panelists have no conflict of interest with respect to the cases they hear is fundamental to the integrity and effectiveness of the panel process. The FTA provides that the two governments shall establish a Code of Conduct for panelists prior to the date of entry into force of the Agreement. Although the details of the Code of Conduct have not been completed, a central element of the Code is the avoidance of any actual or apparent conflict of interest. Roster and panel members will, of course, have to certify to their adherence to the Code of Conduct.

To fully ensure against conflicts of interest, however, we are proposing a panel selection process under which candidates for the roster would be required to disclose, on a confidential basis, financial and other interests and affiliations to an interagency committee charged with implementing panel selection. The same interagency committee would review similar disclosures of Canadian candidates for the roster. At the same time, less sensitive information would be publicly disclosed about roster candidates, and the interagency committee would consult closely with the private sector, bar associations, and congressional committees about potential roster members. A second series of disclosures, both confidential and public, would be required by roster members selected for potential appointment to a panel. At that stage, the confidential disclosures and the public certifications would relate specifically to the industries and issues involved in the case to be heard. We believe this kind of selection process will ensure against appointment of any panelists who might have a conflict of interest or the appearance of a conflict of interest. Moreover, the FTA provides an additional safeguard; the decision of a panel may be challenged in an Extraordinary Challenge Committee on the ground that a panelist had a serious conflict of interest. While we think this safety-valve appeal process will rarely, if ever, have to be invoked, its very existence provides an important protection against conflicts.

Questions 1 and 5

Does the substitution of a binational panel for Article III review in Canadian antidumping and countervailing duty cases foreshadow the end of the Court of International Trade?

Response

No, the binational panel process under the FTA does not foreshadow the end of the Court of International Trade (CIT), for several reasons.

First, neither government set out to remove jurisdiction from its federal courts. It was the Canadian perception that U.S. administrative determinations might be politically influenced--a perception we strongly dispute--and not either government's concern over the other country's court decisions, that led to the Canadian desire for a binational review process.

Second, the binational process is an interim mechanism, designed to be in place only for the next few years, while the two governments attempt to negotiate discipline over subsidies and more fundamental approaches to unfair trade problems in the Free Trade Area. We do not view it either as a permanent mechanism, or as a model for other agreements, whether bilateral or multilateral.

Third, U.S. antidumping and countervailing duty cases against Canadian products are only a tiny fraction of the cases before the CIT. Of the more than 700 AD/CVD cases filed by U.S. industries since 1980, only 31 involved Canadian products, and only 13 of those led to AD/CVD orders. Appeals of AD/CVD determinations in Canadian cases are less than six percent of the total AD/CVD cases now before the CIT, and less than one percent of the total cases before the CIT.

Finally, and perhaps most important, the CIT and the Court of Appeals for the Federal Circuit will continue to be the interpreters of U.S. antidumping and countervailing duty laws. Under the FTA, panel decisions are binding only as to the matter before the panel, and in reaching a decision in a U.S. case, a panel must apply U.S. law, including U.S. judicial precedents. Consequently, U.S. court decisions will be influenced by panel decisions only to the extent that the court wishes to take into account a panel's persuasive reasoning, but binational panels must follow U.S. court interpretation of U.S. law.

Questions 2 and 6

I understand that the Agreement provides for the establishment of a statutory review panel to minimize the possibility that amendments to Canadian or American antidumping and countervailing duty laws might undercut the benefits of the Agreement.

Could you please explain how this review panel would work? Who would actually negotiate with the Canadians on a specific amendment? Congress? And if not Congress, how can the Administration speak for Congress?

Response

Article 1903 of the Agreement provides that, if either country amends its antidumping or countervailing duty law, the other government may request establishment of a binational panel to provide an advisory opinion as to whether the amendment is consistent with the General Agreement on Tariffs and Trade (GATT) and the GATT Antidumping and Subsidies Codes, or with the object and purpose of the Free Trade Agreement. After the appointment of the five-member panel, the panel would have 90 days to provide a written advisory opinion. If the panel concluded that the statutory amendment was inconsistent with the GATT or the FTA, it could recommend ways of changing the statute so that it would conform with the GATT or the FTA. If a party objects to the panel's opinion, the panel must reconsider its initial opinion and issue a final advisory opinion.

This panel review process may be triggered only after the AD or CVD law has actually been amended. Consequently, in the case of an amendment to the U.S. AD or CVD law, there would be substantial opportunity for Canada for advise of its concerns before a proposed amendment became law, and for the Administration and the Congress, working together, to assess whether the proposed amendment posed a GATT or FTA problem. We therefore think the panel process will rarely be invoked. Moreover, after an advisory panel opinion, the two governments have 90 days to attempt to resolve the issue and nine months thereafter to implement the agreed solution. Seeking remedial legislation is only one possible solution. We envisage that the Administration and the Congress would work very closely together to determine whether remedial legislation was a necessary or appropriate way to resolve the issue, and if so, what the content of such remedial legislation should be.

In any discussions with Canada, the Administration would reflect Congressional views. At the end of the process, Congress would decide whether or not to further amend the statute. If it did not and no other resolution had been agreed, Canada would be entitled to mirror the original U.S. amendment at issue.

Question 3

Ms. Anderson, how would cumulation cases involving several different countries be handled under this new system? As I understand the current system, the International Trade Commission adds together the effects of similar products imported by different countries to determine whether injury has occurred.

- Does the Commission determine the injury of each individual country, or only the aggregate injury?
- If only in the aggregate, how would the panel assess Canada's liability?
- Are you concerned about the disparate results that may arise from the same complaint and what effect this may have on our other trading partners?

Response

Under the International Trade Commission's current practice concerning injury determinations in which imports from several countries are cumulated, the ITC does not make a separate injury finding for the imports of each individual country. In a case in which, for purposes of the injury determination, Canadian imports were cumulated with imports from other countries, a binational panel asked to review injury in the Canadian case would review the entire, aggregated injury determination of the ITC. However, the panel's decision would be effective only as to the Canadian imports.

We think the problem of cumulated cases is more apparent than real. First, injury determinations in which Canadian imports are cumulated with imports from other countries, and are a substantial factor in total imports, are relatively rare. Second, under current antidumping and countervailing duty law, if imports from countries A, B, and C are concurrently investigated and cumulated for purposes of the injury determination, they remain cumulated for injury purposes even though country A's imports are subsequently found not to have been dumped or subsidized. Consequently, if there is any inequity, it arises not from bifurcated review as a result of the Free Trade Agreement, but from current law.

We have considered a number of options for dealing with cumulation situations in the FTA context. We believe that the issue will be fairly and workably resolved by (1) providing in the implementing bill that a court is not bound by, but may consider, the decision of a panel; and (2) making clear in the Statement of Administrative Action that a court, in reviewing an injury determination in which imports from several countries were cumulated, must take the injury determination as the

International Trade Commission made it, rather than as it may have been modified by panel review. Thus, if a panel upheld subsidy and injury findings on Canadian products, that finding would apply to the Canadian goods; but the court might still find a deficiency in the International Trade Commission's injury finding, and an ITC decision on remand would apply only to imports from other countries. Likewise, the panel might remand the Canadian portion, but the court could still uphold the agency determinations, and its decision would be effective for non-Canadian imports. This solution holds Canada to the results of panel decisions yet ensures that third countries will not, by virtue of the FTA, obtain "decumulation" that is not available under current law.

Question 4

The Agreement provides that final decisions will be issued by the panel within 315 days of the request for a panel.

- How long does it normally take for a decision to be handed down by the Court of International Trade?
- What happens if the panel is unable to meet this deadline?
- Is there any recourse for the complaining parties?

Response

An appeal of a Department of Commerce or International Trade Commission determination to the Court of International Trade takes at least a year; a delay of two to three years between the agency determination and the final CIT decision is not uncommon. Attorneys representing private litigants in antidumping and countervailing duty cases have indicated that parties customarily allocate at least two years for such an appeal.

We anticipate that binational panels will meet the FTA timetable providing for panel decisions within 315 days of the request for a panel. A panel will hear only one case, and therefore will not face the courts' problem of dealing with a complex calendar of hundreds of cases. Moreover, we anticipate that an individual panelist will generally serve on only one panel at a time, and a person's availability and willingness to meet the obligation imposed by the FTA's strict timetables will be criteria in the selection of roster and panel members. There may nonetheless be cases of great complexity or cases involving unforeseen circumstances that make the 315-day deadline impossible to meet. We anticipate that the final rules of procedure for the panels, which are to be agreed between the Parties before entry into force of the Agreement, will provide for brief extensions in extreme circumstances. Finally, panels will perform under a bilateral spotlight which we think will ensure that panels carry out their FTA obligations.

The FTA provides no specific procedure for curing panel delay. However, the FTA does provide for the replacement of a panelist who becomes unable to fulfill his duties or is disqualified for violation of the code of conduct. A party complaining of delay could seek invocation of those provisions; the interest of both governments in the panel working effectively would require them to act.

Question 7

The Agreement provides that each country will have four peremptory challenges in the selection of panel members.

- o Do the private parties have the same right?

Response

The FTA provision of four peremptory challenges to each country in the process of selecting an individual panel is an aid to ensuring the selection of independent, objective, and highly competent panel members. Peremptory challenges will be exercised for the United States by the U.S. Trade Representative or his designee, upon the advice of an interagency group charged with overseeing the panel selection process, and after consultation with all U.S. parties to the proceeding.

Peremptory challenges in the FTA panel appointment process are not intended to be used as a tool of advocacy by individual parties (whether private or government agency parties) to the proceeding. Indeed, because antidumping and countervailing duty cases usually involve many parties--including petitioners, multiple importers, multiple producers and exporters, and administrative agencies--the exercise of peremptory challenges by individual parties to the proceeding is a practical impossibility.

Question 8

The Agreement requires the Interagency selection group to consult with Congress in the selection of roster candidates.

- Is there a similar requirement for the selection of individual panels?

- Is this consultation requirement equivalent to the advise and consent role we have with respect to the selection of U.S. judges?

Response

Yes, the interagency group charged with the selection of roster members and appointment of individual panels will consult closely with the Congress at both stages of the appointment process. The appointment of individual panelists must be completed, under the terms of the FTA, on a strict timetable ending 60 days after the request for a panel. The interagency group would seek the views of the four Congressional Committees of primary jurisdiction in this area -- the Senate Judiciary Committee, the Senate Finance Committee, the House Judiciary Committee, and the House Ways and Means Committee -- immediately after the request for a panel, and as necessary until the end of the 60-day period.

This consultative role in both roster and panel selection will ensure that the Congress has a significant role in protecting the integrity of panel appointments and avoids conflicts with FTA requirements that formal Senate confirmation would create.

Question 9

An extraordinary challenge is available where one of the three following actions has materially affected the panel's decision and threatens the integrity of the binational panel review process:

(1) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,

(2) the panel seriously departed from a fundamental rule of procedure, or

(3) the panel manifestly exceeded its powers, authority or jurisdiction as set forth in Article 1904.

- o What happens if the panel clearly misapplied the applicable law? Is there any appeal?

Response

Yes, under the FTA, a panel's "power, authority or jurisdiction" is strictly limited, in a U.S. case, to applying U.S. law, including the statute, the legislative history, regulations, administrative practice, and judicial precedent. The panel must also apply the U.S. standard of judicial review and general legal principles that would be applied by a U.S. court. If a panel chose to ignore U.S. law in a U.S. case or opted to apply principles or concepts not a part of U.S. law, the panel decision would be subject to review by an Extraordinary Challenge Committee. In addition, of course, any constitutional claim that may arise in an antidumping or countervailing duty case could be heard by an Article III court after the panel's decision.

Question 10

I can understand where you would not want the extraordinary challenge procedure to function as a routine appeal. However, not requiring either Government to invoke the procedure upon request by private parties gives the government considerable power and flexibility that it presently does not have.

- What would prevent the government from ignoring a request for review just because it did not feel it was in the government's best interest to pursue the matter?

- Can the private parties appeal the government's decision?

Response

The binational panel process plainly will not work -- and the Congress cannot be expected to stand silently by if it fails to work effectively -- unless private parties to antidumping and countervailing duty proceedings have confidence that their rights are protected. Consequently, we are convinced that the narrow interests of a government agency in protecting its administrative decision or a short-term foreign policy interest in avoiding trade friction with Canada will pale beside the more fundamental "best interest of the U.S. Government" in maintaining confidence in an objective binational system of quasi-judicial review.

The FTA does not provide for private parties appealing a government's decision not to seek extraordinary challenge review because any such review by a national court would necessarily constitute a review of the panel decision, which would violate the FTA. We anticipate that the U.S. Government will consult very closely with private parties who desire an extraordinary challenge procedure and will, for the reasons just stated, seek such review whenever the criteria for an extraordinary challenge procedure are met.

Senator Grassley

Question 1

What impact will the Free Trade Agreement have on ethanol coming to the United States from Canada?

Ethanol is a fungible commodity. It can be made from cheap wine alcohols, transshipped from other nations to Canada, and exported to the United States. How exactly does the Agreement treat this potential problem? Does it require that duty free ethanol be made exclusively from U.S. or Canadian product?

Response

The FTA eliminates the 15.85 cents per liter temporary duty on ethanol used as fuel by January 1, 1998 through ten equal annual cuts. (See HS item 9901.00.50 in the FTA schedule of U.S. tariff concessions.) If this temporary duty is terminated with respect to other countries before January 1, 1998 than it will also terminate with respect to Canada. The FTA also terminates by January 1, 1998 the 3 percent duty on undenatured ethanol for non-beverage use and denatured ethanol. (See HS 2207.10.60 and 2207.20.00 in the FTA schedule of U.S. tariff concessions.)

There is a potential problem that undenatured wine with 24 percent or less alcohol content from the EC could be made into ethanol for use as fuel in Canada and enter the United States under the FTA tariff preference. The potential problem may not become a reality because extensive processing would be required to make this alcohol into ethanol for fuel use. But more importantly Canada charges high duties on imports of wine. After January 1, 1994, the FTA prohibits Canada and the United States from granting duty drawback on goods traded bilaterally, i.e., neither country can rebate import duties paid on products used in making other products subsequently exported to the other FTA country.

Thus, on January 1, 1994, when the FTA tariff will be 40 percent of the MFN tariff, drawback will no longer be granted; thus, it will be very expensive to import EC wine into Canada to make into ethanol for use as fuel in the United States because the wine will be subject to the high Canadian duty. If Canada were to lower its MFN duties on wine so that the United States experienced an increase in ethanol imports from Canada, the United States Government would seek consultations under the rule of origin for the FTA with a view to revising the rule.

Also, Article 1101 of the FTA could provide protection against increased ethanol imports from Canada. Under this article, if imports of ethanol from Canada increased so that these Canadian

imports alone constituted a substantial cause of serious injury to the domestic industry, the United States could suspend further duty reductions or increase the rate to the lesser of the MFN then in effect or the MFN rate in effect on day before the Agreement entered into force. The higher duty cannot be maintained for longer than three years.

Senator Grassley

Question 2

The Agreement provides for a rollback of tariffs over a ten year period. Canada, however, heavily subsidizes much of its industry, including agriculture. How will these mandated rollbacks take into consideration the subsidies? Without addressing the subsidy issue, isn't this just a tariff reduction agreement?

Response

For those industries more vulnerable to import competition from Canada, such as certain agricultural products, we provided a ten-year phase out of tariffs to ease the adjustment process. We have also provided in the FTA a special safeguard provision under Section 201 for the transition period while tariffs are being reduced. If imports resulting from FTA duty reductions cause serious injury, then the pre-FTA tariff or current MFN duty (whichever is lower) may be reimposed, or the duty reductions can be suspended for a period of up to three years.

To the extent our industries' concern is the impact of subsidized imports of Canadian products, including agricultural products, then the countervailing duty law is the proper recourse provided by Congress, and tariffs are not an appropriate substitute for it. If U.S. agricultural producers believe they have been injured by Canadian subsidies, they may take advantage of the remedy available under that law, which was not changed by the Agreement.

In the FTA negotiations, the Administration sought to obtain tougher disciplines on Canadian subsidies. However, we deemed the price for such disciplines (Canadian exemption from the U.S. countervailing duty law) to be too high. The first goal of the Working Group to be established under Article 1907 of the Agreement is to "develop more effective rules and disciplines concerning the use of government subsidies...." Thus, in terms of disciplining Canadian subsidies, the Agreement is a beginning, not an end.

May 21, 1988

Hon. Howell Heflin
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Heflin:

Thank you for your attentive consideration of my testimony to the Committee yesterday. Here are my responses to the written questions provided by you and your colleagues at the close of the hearing. Because a number of the questions concern closely related subject matter, I have taken the liberty of rearranging and combining them somewhat in the interest of clarity.

1. Would the Free Trade Agreement's creation of a binational arbitral panel to replace domestic judicial review violate the Appointments Clause of the Constitution? Is the Office of Legal Counsel of the Department of Justice correct that the Appointments Clause requires presidential endorsement of decisions of the panel before they may take effect in the United States? What are the implications of OLC's position for international law and the negotiation of international agreements?

Appointments Clause concerns stem from some broad language used by the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), in which the Court forbade Congress to appoint members of the Federal Election Commission. The Court said that all "significant authority" pursuant to federal statutes must be performed by persons appointed in conformity with the clause. Since the FTA's panels would have the power to reverse and remand decisions of the Department of Commerce and the International Trade Commission, it is arguable that the panels would be interpreting and applying United States law, and that only "Officers of the United States" may perform such functions. The Office of Legal Counsel would respond to this concern by authorizing the President to direct the agencies to implement the decisions of FTA panels.

The OLC position attempts to serve important values of the separation of powers and the preservation of presidential prerogative that we all share. I believe, however, that the effect of the OLC position is to undermine both values. The reasons why this is so explain why the current version of the FTA meets Appointments Clause concerns, and why OLC's amendment would prove seriously counterproductive.

As a number of the written statements furnished your Committee detail, from the beginning of our Republic Presidents have entered international agreements providing for arbitration

of claims whose existence had disrupted relations between the signatory nations. When these agreements have been entered by treaty or by Congressional-Executive agreements such as the FTA, Congress has participated. There has been no practice of making all members of the international bodies Officers of the United States, or of reserving a condition of subsequent presidential endorsement of results of the arbitration. It is easy to see why this is so. The whole purpose of sending disputed claims to international arbitration is to obtain a neutral, international forum in which both party nations have confidence. The OLC position would deprive the President and the nation of the vital power to settle international claims. How can we expect another nation to enter a settlement agreement if we reserve the power to disapprove the results of particular arbitral decisions with which the President may disagree?

Consider the executive agreements that resolved the Iranian hostage crisis. The arrangements that led to the release of our citizens were very complex. They included the creation of an international claims tribunal for the final arbitration of various claims of our citizens against Iran and vice versa. The negotiations leading to the settlement were extremely delicate, and were conducted through the mediation of Algeria. If we had insisted that the President retain a power of approval over particular arbitral awards, how could the agreement have been concluded? At the time, the Department of Justice comprehensively reviewed the settlement, and approved its constitutionality. The Supreme Court later upheld it in Dames & Moore v. Regan, 453 U.S. 654 (1981). Neither the Department nor the Court suggested that Buckley posed any obstacles.

In short, Buckley needs to be understood in context. It stands for the proposition that ordinary execution of statutes must be vested in those appointed in conformity with the Appointments Clause. International agreements present somewhat different considerations. Since they become part of our law through operation of the Supremacy Clause, they must be concluded in conformity with the Constitution. But that means that they must follow the requisites for a valid treaty or other international agreement. One of those requisites is that they be entered by an Officer of the United States-- the President himself, or one of his principal subordinates. If that condition is met, it has always been understood that the President may decide to settle international claims by sending them to a binding international forum. See generally L. Henkin, Foreign Affairs and the Constitution (1972).

The FTA with Canada stands firmly in this tradition. Antidumping and countervailing duty disputes were a bone of contention between our nations. Instead of replacing the existing statutes of both nations completely, as the agreement could have done, the interim provision of binational panel review was selected. It was important for the new forum to be independent and evenhanded. Consistent with that purpose, the

President could not have retained a power of conditional acceptance of arbitral awards. If the Appointments Clause is read in conjunction with the other powers of the President and of our national government, it does not contain so counterproductive a requirement.

2. Should there be a fast track review for constitutional challenges to the binational panel procedure itself, or to the implementing legislation?

The Committee may prefer to include provision for a fast track review procedure. A recent example that could serve as a model is contained in the Gramm-Rudman-Hollings Act. That provision probably expedited the judicial challenge that eventually invalidated a portion of the Act. A special reason to include such a provision here would be to assuage possible Canadian fears that our domestic judicial review will indefinitely entangle administration of the FTA.

I do not think, however, that fast track review must be provided for there to be reasonable assurance that constitutional challenges can be brought and heard promptly. For example, the first party who is taken to arbitration involuntarily would presumably sue to enjoin the operation of the FTA and its implementing legislation, on grounds of unconstitutionality. That is a familiar kind of action in administrative law, and should present no special difficulties here unless there are signs that Congress has attempted to preclude constitutional review. I and others cautioned the Committee against any such attempt in our written statements, because it raises very delicate constitutional questions of its own. To avoid any implication that the implementing legislation means to preclude constitutional challenges, it would probably be sufficient for the legislative history to indicate that constitutional challenges of the ordinary sort are contemplated.

3. Is Senate confirmation of panel members required?

No. The important consideration is to maintain the appearance of full independence and objectivity of the panel members. The current drafts of the implementing legislation contain sensible procedures for the selection of the rosters of panel members, under the auspices of the USTR. That office has an institutional interest in the smooth functioning of international arbitration, and should be fully acceptable to the Canadians. Some might fear, however, that the addition of Senate confirmation could lead to pressure on prospective panel members to promise responsiveness to American commercial interests. For that reason, I think confirmation is undesirable. There is certainly no constitutional necessity for it. Even if the panel members were considered "Officers of the United States," which I do not believe them to be, the Appointments Clause would allow them to be appointed by the President alone or by the head of a department.

I hope I have adequately addressed these questions in the brief time available to do so. Please let me know if I can be of future service to the Committee.

Sincerely,

Harold H. Bruff

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Andreas F. Lowenfeld
Charles L. Denison Professor of Law

May 23, 1988

Senator Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I write in response to a list of questions submitted to me at the close of the hearing of May 20, 1988 on the binational dispute mechanism contained in the proposed U.S.-Canada Free Trade Agreement.

I. Sen. De Concini questions my suggestion that the binational panel would reduce the political aspect of trade disputes. He assumes that I refer to the current judicial review as the political arena. With respect, that is a misunderstanding of my testimony.

First, at pages 21-22 of my prepared statement and particularly at footnote 22, I was referring to debates about legislative proposals in which opponents and proponents of

particular amendments assert that they are "GATT-illegal" or "GATT-legal," and not infrequently tailor their legal arguments to fit the position advocated on policy grounds. The panels functioning under Article 1903, i.e., in the advisory or declaratory function, would, in my view be able to give unbiased, judicial opinions on the conformity of legislative proposals with the FTA, the GATT, or the Anti-Dumping or Subsidy Code.

Second, and more generally, I believe the procedure in antidumping and particularly in anti-subsidy cases -- at least important ones -- is rarely confined to a legal, non political arena. I was not, of course, suggesting that Article III judges, or indeed other judges, are "political," or lack independence. I was suggesting that a wholly unilateral procedure does not prevent another country from raising the issues at political level. Witness the massive antidumping and subsidy cases brought against the steel producers from the European Community in 1981-82, which ended up in high level negotiations and a series of agreements between the United States and the Community.[1] Or witness the antidumping actions brought by U.S. semi-conductor companies against Japanese firms in 1985-86, which, again, ended up not in final adjudication by the Court of International Trade on appeal from decisions of U.S. administrative agencies but in a politically negotiated agreement which in turn has had its ups

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[1] For a description of this episode, see my book A. Lowenfeld, Public Controls on International Trade pp. 420-49 and Documents Supplement DS-633-646, (2d. ed. 1983).

and downs.[2] The suggestion is that with a binational dispute settlement procedure, such disputes can be confined to legal issues more easily than decisions by the administrative and judicial organs of only one nation.

To repeat, I am not suggesting that a binational panel would be more independent than U.S. Article III judges; I am suggesting that the decisions of a binational panel -- also independent -- could be expected to win more acceptance in a foreign country, and thus to put an end to legal disputes before they give rise to political controversy.

II. Senator Hatch asks two questions:

1. How can the "judicial power" of the United States can be assigned to a binational panel that lacks some of the security that attaches to Article III judges?

I do not regard the function of the panel as exercising the judicial power of the United States. As I have discussed in my prepared statement (pp. 19-21), it would be a mistake, in my judgment, to attempt to fit the panel into a category of "officers of the United States." The panel would be an international body, created pursuant to an international agreement.

As to the implication in the question that independence and the ability to grant due process depend on the criteria by which

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[2] See, e.g., Pres. Reagan's statements, 22 Weekly Comp. Pres. Docs. 1020 (Aug. 4, 1986); 25 Int'l Leg. Mats. 1409-28 (1986).

Article III judges are defined, I would point out that more than half the judges of State courts in the United States (including, I believe, Senator Heflin when he was Chief Justice of Alabama) are elected; it has not been suggested that they cannot grant due process, or indeed decide matters of federal law.

2. Would the FTA conflict with the Seventh Amendment guaranty of the right to trial by jury?

With all respects, I do not understand this question. The binational panels are assigned an appellate review function, not a trial function, so that the issue of jury trial does not arise. Moreover, antidumping and countervailing duty proceedings, being special duty cases, are far from the suits at common law to which the Seventh Amendment is addressed, and of course they are not tried to juries today. The whole of administrative law would have to be revised if it were ever concluded that litigants challenging all governmental action were entitled to trial by jury.

III. Senator Heflin asks three questions.

1. What are the implications of the position of the Office of Legal Counsel on the relation of international obligations to domestic law?

As I stated at the hearing, I found Mr. McGinnis' testimony on behalf of the Justice Department astonishing, and quite unsound. There is of course a distinction between obligations of the United States at international law and requirements of U.S.

law. Thus if Congress passes a law that cannot be reconciled with a prior international obligation, the subsequent law will be given effect, even if it is expressly recognized as contrary to international law. See, e.g., Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973), upholding the effectiveness of the so-called Byrd Amendment that required the United States to import chrome and related products from Rhodesia, notwithstanding comprehensive sanctions against Rhodesia required by a binding resolution of the United Nations Security Council pursuant to the U.N. Charter. See also Restatement (Third) of the Foreign Relations Law of the United States §115 (1987). But that is wholly different from saying Congress cannot by statute require the President to carry out an international obligation.

There has been much writing and much confusion about self-executing or non-self-executing treaties, the difference being that the latter require for certain purposes that Congress enact implementing legislation. When an international agreement is concluded as a Congressional-executive agreement, as the FTA will be, the legislative approval is the implementing legislation. Thus both the agreement and the implementing legislation are the law of the land, and the idea that the Commerce Department or the International Trade Commission or the President cannot by such legislation be required to take specified action is just plain wrong. There are simply hundreds of tax treaties, FCN treaties, consular conventions, arbitration conventions, etc., etc., which

are applied as United States law, and do not involve the President, let alone engage his discretion. I cannot imagine that the Department of Justice would regard all of these agreements as non-binding under United States law; surely United States courts would not so rule.

I see no reason why the analysis is different depending or whether the obligation is a precise one -- e.g., certain kinds of income is to be taxed at a specified rate, or a contingent one -- e.g., a dumping finding is to be reconsidered in light of a panel opinion. Nor can I follow the reasoning according to which the members of a binational panel would be converted into "officers of the United States" depending on whether the U.S. government was required to carry out the decision of a panel or the President's discretion was interposed.

2. Should there be fast track review for constitutional questions challenging the binational review procedure itself?

I think the sooner the doubt about the constitutionality of the panel procedure is removed, the better for the Free Trade Agreement and for all persons involved in trade between Canada and the United States. I do not believe, however, that a special challenge procedure needs to be built into the implementing legislation. As I indicated in my testimony, I think a simple way to test the constitutionality of Article Nineteen of the FTA would be an attempt by a party dissatisfied with a decision of the International Trade Commission or the Commerce Department to

seek review of that decision in the Court of International Trade. If that Court dismissed the petition in reliance on the FTA, the dismissal could be reviewed by the Court of Appeals and (before or after decision by that court) by the Supreme Court. That was the procedure followed in Dames & Moore v. Regan, 453 U.S. 654 (1981), concerning the Iran-U.S. Claims Tribunal, and the entire procedure took less than 6 months. I do not believe a special procedure is necessary, and therefore I do not think it is desirable. I would suggest that the report of the Committee simply contain a sentence making clear that there is no intention of foreclosing judicial review of constitutional issues, citing Johnson v. Robison, 415 U.S. 361 (1974).

While I do think the questions concerning compatibility of the Agreement with Article II and Article III of the Constitution deserve a prompt answer, I see no reason to encourage challenges thereafter. Special provisions are not made for constitutional challenges of other kinds of decision making -- such as administrative proceedings or arbitral awards, and I think the invitation to disappointed litigants to dress their losing cause up as due process claims would be ill-advised. In the unlikely event a panel created under the FTA goes seriously wrong, the special challenge procedure is available under Annex 1904.13. I think that reserve provision, plus the establishment of the working group (See Article 1907(1)(c)) reduce the risk of arbitrariness of the panel procedure to close to nil.

3. Is Senate confirmation of panel members required?

I believe that Senate confirmation of panel members is not required, and indeed would be highly undesirable. (Here I disagree with the representatives of the American Bar Association). I think it is clear that member of panels would not be "officers of the United States," but would be members of an international organ created pursuant to an international agreement. Any effort to clothe the members of the roster, or indeed of individual panels, with the trappings of Presidential appointment plus Senate confirmation would just confuse the issue. The basis for selection of U.S. citizen members of the roster is the foreign affairs power of the President, confirmed in this case by approval of the Agreement. Any reasonable procedure for selecting the panel members -- say by a subcommittee of the Trade Policy Committee -- is satisfactory. Membership on the roster should not be seen as a political plum or reward, and need not be a Presidential appointment, even without confirmation.

I hope these answers are helpful, and I thank the Committee for giving me the opportunity to testify.

Sincerely,

Andreas F. Lowenfeld
Charles L. Denison
Professor of Law

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

VIA TELECOPIER

May 23, 1988

Mark H. Gitenstein, Esq.
Chief Counsel
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Gitenstein:

This is in response to your letter of May 20, attaching written questions in connection with the U.S.-Canada Free-Trade Agreement. I hope you will express to Senators Heflin, Grassley, Hatch, DeConcini, and Thurmond, the Association's appreciation of their consideration of the Constitutional questions present in the U.S.-Canada Free-Trade Agreement. The answers to the questions are set forth below.

1. (Senator Thurmond)

Q. "There is some concern that this Binational review panel may be used as a model for resolution of future multi-lateral trade disputes. In your judgment, would this panel set a potentially undesirable precedent for future trade agreements?"

A. Yes. We have already learned that Israel, which has a free-trade agreement with us, has asked for dissimilar treatment. While Government representatives have contended that it would be difficult to agree to such a binational panel with countries whose jurisprudence is similar to ours, this is hard to accept in view of the acknowledgment that part of the reason for having such binational panels is to permit the governments to reach agreement on political resolutions of the cases. As a Canadian speaker said at the recent Judicial Conference of the Court of Appeals for the Federal Circuit, they envision the panel device as a situation where the two governments can agree on a "tit for tat" exchange, i.e., you let this company dump in your country, and we'll let your company dump in our country. Further, having the same jurisprudential system or same legislative system, or same governmental philosophy has never hindered the setting up of international panels in other areas, and we doubt that differences in our jurisprudence or other governmental differences would hinder those in the Executive who see these binational panels as a means of avoiding judicial review of administrative decisions which are quasi-legislative and quasi-judicial in nature.

2. (Senator Hatch)

Q. "How do you respond to the separation of powers concern relating to the question of whether or not the 'judicial power' of the U.S. that can be assigned to this binational panel? The panelists would lack the guarantees that enable an officer to exercise such judicial power in that they are not granted good behavior tenure and security of

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compensation (Article III, sec. 1) and yet their function would seem to involve the exercise of judicial power."

A. The essential basis of our opposition to the establishment of the Binational Dispute Settlement Panels is exactly that they do violate the tripartite nature of our government and the separation of powers in that the establishment of those panels seeks to avoid the judicial branch of the government. There seems to be no question that the kind of issues which would be present in cases contesting decisions of the International Trade Commission and the International Trade Administration of the Department of Commerce involving dumping duties and countervailing duties are cases which properly come within the judicial power of the United States as set forth in Article III. See Glidden Company v. Zdanok, 370 U.S. 530 (1962) and reports of the Senate and House Judiciary Committees (H.R. Rep. No. 2348, 84th Cong. 2d Sess. 1 (1956); S. Rep. No. 1827, 84th Cong. 2d Sess. (1956), in support of the Act of July 14, 1956, recognizing the predecessor of the Court of International Trade (the Customs Court) as an Article III Court.

The concept of Article III Courts is to guarantee to citizens the right of judicial review by impartial and objective judges who by virtue of their life tenure and security of compensation are free from governmental influence. The panelists would be ad hoc appointees drawn from a list made up by the governments, who in many instances would be joined against an American manufacturer (or a Canadian manufacturer) who had lost before an administrative agency. Not only would these panelists be beholden to the government agencies for their selection on the particular panel, but for consideration for selection for future panels. In addition, it is hard to see how impartial panelists can be chosen if it is hoped to have panelists knowledgeable in international trade law and yet have a panelist who cannot see the precedential value of his decision in the Canadian case on another case, for whch he has a client, be that client Canadian or non-Canadian.

3. (Senator Hatch)

Q. "Some have noted that this Agreement may conflict with the guarantees of the Seventh Amendment. Specifically, the Seventh Amendment requires that 'in Suits at common law . . . the right of trial by jury shall be preserved . . .' Moreover, in the Northern Pipeline and Union Carbide cases, the Supreme Court, has recognized that whether or not a public right vs. private rights rationale is employed, if the subject matter of the suit was recognized at common law or in equity at the time of the founding of the Republic, review by an Article III Court is required.

"Were cases similar to the types of anti-dumping and countervailing duty cases which will wil be heard by the Panel under the Free Trade Agreement, the types of cases that would have been granted a trial by jury under common law or in equity?"

A. While the countervailing duty statute was not enacted until 1897 and the antidumping statute until 1921, the basis of suits by importers attacking the administrative decisions under these Acts is to protest the assessment of additional duties pursuant to these Acts. As was observed by the majority in Washington International Insurance Company v. United Sttes of America, 678 F. Supp. 902, 12 CIT ___, (three-judge panel, January 12, 1988, appeal noted), "[t]he reports of both English and American lawsuits are replete with Customs cases, many decided by juries, before and after adoption of the Seventh Amendment in 1791." 678 F. Supp. at 905. The Washington opinion is replete with examples of customs cases tried before juries prior to the Customs Administrative Act of 1890, 26 Stat. 131. There is no doubt in our mind that the importer had a common law right to sue the collector contesting the correctness

or lawfulness of the assessment of duties, or as noted by the Supreme Court in Cary v. Curtis, 44 U.S. (3 How.) 236, 250 (1846) other actions at law or in equity. We question whether, if the deprivation of the right to sue the sovereign in such cases involving Canadian merchandise because of the Binational Dispute Panel were upheld, the common law right to sue the District Directors of Customs would not revive.

4. (Senator DeConcini)

Q. "There has been considerable controversy over whether panel decisions are self-executing or is whether the President is required to direct the agencies to implement these decisions. Would you please comment on this?"

A. As we read the language of the Agreement as initialed in December of 1987, we assume that the negotiators considered that the panel decisions would be self-executing. We heard the Department of Justice proposal at the hearing on May 20 that the President direct implementation of the decisions. We think this controversy points out a basic fallacy in the attempt to deprive the citizens and the courts of judicial review in these matters. Advocates often point to the instances of arbitration in international cases involving admiralty, securities, and other contractual disputes between citizens of different countries. What they always fail to mention is that these arbitrations come about because of a contractual agreement by the parties to resolve their disputes through arbitration. Without such contractual agreement, there would be no obligation to use the arbitration method. But what is also important, and is never mentioned, is the fact that those arbitrations are always subject to judicial review and their decisions cannot be given effect without a court issuing a judgment. We would have no objection to the utilization of a binational panel to resolve dumping and countervailing duty matters if each party to the administrative hearing agreed to such a process and to be bound by such process.

Making the panel decisions self-executing underscores the attempt to have these matters resolved entirely in an administrative process without the parties being able to avail themselves of judicial review. Having the President implement the decisions without any exercise of discretion on his part is a formalistic attempt to further confuse the fact that what these panels are interpreting basically, as recognized in the Agreement, is U.S. domestic law, i.e., the antidumping and countervailing duty provisions of United States statutes.

5. (Senator DeConcini)

Q. "The proposed enabling legislation provides for the review of constitutional issues as the legislation is enacted and applied. Wouldn't this take care of the due process concerns?"

A. No. While the provision for review of Constitutional issues addresses the most blatant defect in the proposed Binational Panel process, it does not take care of our due process concerns. The dispute settlement provisions attempt to deny to the importer the right he has had from the beginning of this Republic, and under the common law of England, to have the correctness of his duty assessments, and the decisions a part thereof, reviewed in a court of law. The attempt to deprive him of this right, and to give to the Binational Panel the power to interpret and apply United States domestic law and effectively set the importer's duty liability to the United States, is the taking of an importer's property without due process of law. He has a right to have a hearing on such matter before an inferior court, subject ultimately to review by the Supreme Court. The Supreme Court has "traditionally" held that "the Due Process Clauses

protect civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attemping to redress grievances". Logan v. Zimmermann Brush Company, 455 U.S. 422, 429 (1982). The fact that a trial or hearing has been provided does not mean that due process has been completely satisfied. "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377 (1971). A cause of action has been held to be "a species of property protected by the Fourteenth Amendment's Due Process Clause". Logan v. Zimmermann Brush Company, 455 U.S. 422, 428 (1982). The opportunity to obtain judicial review of Constitutional issues does not overcome our due process concerns since, in our view, due process requires that before an importer be deprived of his property rights, he should have the opportunity to have a court review of the administrative decision, as to the correctness and legality thereof.

6. (Senator DeConcini)

Q. "You raise a due process concern with the Trade Agreement. However, the Agreement requires the government to automatically request a panel review upon the request of a private interested party. It also provides that these private individuals have the right to appear and be represented before a panel. Given these rights and the provision of procedural safeguards, please explain why you think the binational panel would violate the due process clause?"

A. The Binational Panel would violate the Due Process Clause, first of all, and in substituting for judicial review before an Article III tribunal, review before a non-Article III panel. The whole procedure also speaks of a continuing effort by the governments to resolve the matters before the panels not on a statutory basis but on the basis of balancing one case off another. The individual petitioner's rights could thus be bartered away without concern as to how he is personally and economically affected. It should be observed, further, that an interested party may not force his government to envoke the extraordinary challenge process. Further, the interested party has no opportunity to enforce the procedural process as set up for the panel since there is no jurisdiction in a court to issue a mandamus to require the panel to comply either with the procedures or the time limitations. As the whole binational process violates the safeguards which an interested party has in the system of Article III judicial review, the fact that the interested party has a right to appear before the panel does not satisfy the requirements of due process since such panel is not a judicial body and he is deprived of judicial review in a proceeding which ultimately, as to an importer, may require him to pay additional duties, or as to a U.S. manufacturer, consumer, or trade union, adversely affect him economically.

7. (Senator DeConcini)

Q. "Do you believe that Congress has the authority to limit the jurisdiction of Article III courts? If so, why is it unconstitutional for Congress to limit the jurisdiction of the Court of International Trade?"

A. Yes, Congress has the authority to limit the jurisdiction of Article III courts in certain respects. Certainly, it could withdraw the waiver of sovereign immunity in suits involving Customs matters such as countervailing duty and antidumping cases. But we question whether Congress could constitutionally withdraw from Article III courts, including the Court of International Trade, the common law rights which importers have had since before the days of the Republic, and certainly since, to challenge the

assessment of customs duties. As the Supreme Court said in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856):

> "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not subject for judicial determination."

We believe that the Seventh Amendment intends to preserve those common law rights in our courts and that such a common law right would be revived if Congress withdrew jurisdiction from the United States courts of cases involving Canadian merchandise subject to our dumping and countervailing duty laws. We would also question whether it would not be a violation of equal protection of our laws to deprive the right of judicial review only with regard to Canadian merchandise.

8. (Senator DeConcini)

Q. On page 16 of Professor Bruff's testimony he states: 'Granting adjudicative power to an international body, whose decisions become binding domestically through the operation of the supremacy clause, is no intrusion on an essential function of the federal judiciary'. Would you please explain why you disagree with this statement?"

A. Prof. Bruff's argument is based on the assumption that our dumping and countervailing duty laws somehow become international law by virtue of the Free Trade Agreement. The Free Trade Agreement itself states that it is domestic law which will remain and domestic law which is going to be interpreted by the Binational Panel. Further, Prof. Bruff's argument relies on analogies to binational border commissions and binational or multi-national foreign claims settlement commissions. As Government witnesses have conceded, these are not really analogous and the binational panel proposed in the Canada Agreement is unique. It is unique because it gives authority to a body, which could be composed in its majority of foreign citizens and which is not an Article III court, of interpreting and, ultimately, of enforcing by agreement their interpretation of domestic law. It also rests on the avoidance or ignoring of what are basically private rights inherent in these disputes. It is not the Government of Canada which initiates a sale of merchandise in the United States at less than its fair market value, i.e., at less than the price it is being sold for in Canada. That is a decision of a Canadian manufacturer or exporter. It is an American manufacturer, wholesaler, or producer who complains of such sales as being contrary to our dumping laws and as injuring his business or the ability of a U.S. business to be established. The U.S. Government is involved only in that Congress has enacted statutes which have required the International Trade Commission and the International Trade Administration to enforce the antidumping laws. The antidumping petitions are prosecuted and defended through the administrative process by the legal representatives of the petitioners and respondents.

Likewise, countervailing duty matters are also brought by individual interested parties in the United States complaining of merchandise being sold in the United States at cheaper prices because of the utilization by a foreign exporter of subsidies granted by a foreign nation, i.e., Canada. While the Canadian statutes will be considered by the administrative agencies in determining whether or not they grant subsidies in accordance with the Subsidies Code of GATT, the ultimate question then comes down to whether the exporter has availed himself of the subsidies and whether the complaining industry in the United States has been injured by the importation and sale of the affected merchandise. Frazier & Beatty, barristers and solicitors in Toronto and Ottawa (as well as in Hong Kong) have printed "A Guide to the Canada-United States Free Trade

Agreement", copyright February 1, 1988, and stated therein at page 64 is the following: "The FTA, recognizing that antidumping and countervailing duty cases are essentially private actions, has expressly assured private parties access to the binational panel review mechanism."

Professor Bruff's statement ignores (a) the essential private nature of the rights sought to be protected in antidumping and countervailing duty actions and (b) the fact that the adjudicative power sought to be granted the international body can result in the assessment of additional duties by the Government against an individual. As Customs litigative matters are traditionally concerns of the federal judiciary, the deprivation of that concern is an intrusion on an essential function of the federal judiciary.

Please feel free to call or write if you require any further views or explanations. We appreciate the opportunity to have been heard.

Sincerely yours,

Andrew P. Vance

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Chairman, Trial and Appellate
Practice Committee

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May 23, 1988

Hon. Howell Heflin
United States Senate
Committee on the Judiciary
Washington, D. C. 20510-6275

Dear Senator Heflin:

When I testified before you on May 20, 1988 concerning the binational panels created by the Canada-United States Free Trade Agreement, you requested a written answer to the following question: "Mr. Baker, are you aware of any circumstances where individuals not appointed by the President give orders to Executive agencies?"

The answer is yes. Without pretending that these exhaust the possibilities, I would draw your attention to three such circumstances.

1. The most striking example occurs when private parties not appointed by anyone are given authority over the official acts of federal agencies. For example, the Agricultural Marketing Agreement Act of 1937 provided that the Secretary of Agriculture could issue mandatory milk marketing orders in certain circumstances, but only if the order received the approval of two-thirds of the milk producers in the marketing area. This meant that private parties could veto the Agriculture Department's proposed actions. Attacked as an unconstitutional delegation, this arrangement was upheld by the Supreme Court. United States v. Rock Royal Corp., 307 U.S. 533, 577-78 (1939).

2. In a law upheld by Seattle Master Builders Assn. v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F2d 1359 (9th Cir. 1986), Congress provided for an interstate council that regulated the actions of a federal agency, the Bonneville Power Authority. The council members were named by state governors, not the President. This arrangement was attacked as a violation of the Appointments Clause, but was upheld by the Ninth Circuit because the council

derived its authority at least in part from an interstate compact, not just federal law.

3. Finally, one should not overlook the obvious: state legislators and regulators. Though not appointed by the President, they enact and administer a host of state laws, from speed limits to environmental regulations that are applied every day to federal executive agencies. In fact, the Supreme Court has on several occasions sustained congressional enactments explicitly requiring that federal agencies obey state law, including the determinations of state administrative agencies. See California v. United States, 438 U.S. 645, 663-70 (1978) (federal dam subject to state water resources agency); Hancock v. Train, 426 U.S. 167, 169-72 (1976) (discussing Clean Air Act requirement that all federal agencies comply with state air pollution regula-tions).

To me, these cases strongly suggest that binational panels may issue direct orders to federal agencies without being appointed by the President.

Very truly yours,

Stewart Abercrombie Baker

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May 23, 1988

The Honorable Howell T. Heflin
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Heflin:

I appreciate the opportunity to have testified before the Senate Judiciary Committee last week on behalf of the American Bar Association with respect to the dispute resolution provisions of the U.S.-Canada Free Trade Agreement.

At that time, you posed the following question:

> The U.S. and Canada are in the process of developing rules of conduct for the binational panel members. How do you think these rules should be structured, and what elements should be incorporated in them?

My answer is as follows:

The Code of Conduct for panelists now being negotiated by the United States and Canada should be written so as to ensure the impartial and effective operation of binational panel review. If fashioned in line with this basic principle, the panel mechanism will not become a political process, and decisions can be rendered in a neutral and unbiased fashion. Given the importance of the Code, its formulation also should involve wide public participation; this too will facilitate a fair panel process.

As to the specifics of the Code, it should contain clear standards of conduct modelled after the rules of ethical conduct that apply to arbitrators in commercial disputes. To ensure impartiality, the Code should preclude

panelists from ex parte contacts with the litigants and proscribe them from accepting any gifts from the parties.

Also, to ensure panel independence, the procedural rules or code of conduct could specify that persons selected as panel members are required to disclose any interest or relationship likely to affect his or her impartiality or which might create an appearance of impropriety. The Code also should require financial disclosures by roster members being considered as panelists, with such disclosures to be made available to both the parties and the private litigants. However, such disclosures should not be so detailed as to deter highly qualified candidates from serving as panelists.

In sum, the Committee may want to embrace such rules and suggest other ones in its report on the implementing legislation in order to enhance the prospects for their adoption.

If you have any further questions concerning this issue or my testimony more generally, I would be glad to be of assistance.

Sincerely,

Jeffrey P. Bialos